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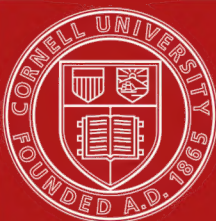
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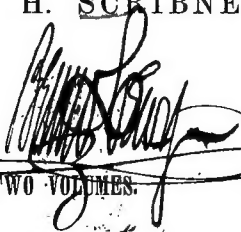
TREATISE

ON THE

LAW OF DOWER.

BY

CHARLES H. SCRIBNER.



IN TWO VOLUMES.

VOL. II.

PHILADELPHIA:
T. & J. W. JOHNSON & CO.,
No. 535 CHESTNUT STREET.
1867.

B 17490

Entered, according to Act of Congress, in the year 1867, by

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Nos. 1102 and 1104 Sansom Street, Philadelphia.

PREFACE.

THE second and concluding volume of the present work is now offered to the public. Its appearance has been delayed somewhat longer than was anticipated, but no longer than was found to be absolutely necessary to its careful preparation.

A desire on my part to aid the investigations of the professional reader by a full discussion of the various topics treated of, and a careful presentation of the authorities, has resulted in expanding the work considerably beyond the limits originally designed. I trust, however, it will not, on that account, be found less serviceable to those who may have occasion to consult its pages.

The favorable manner in which the first volume has been received has encouraged me to labor with renewed faithfulness in the preparation of the second. I sincerely hope it may prove equally acceptable to the profession.

CHARLES H. SCRIBNER.

MOUNT VERNON, OHIO, *June*, 1867.

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THE LAW OF DOWER.

CHAPTER I.

OF THE NATURE AND QUALITIES OF DOWER WHILE THE RIGHT IS INCHOATE.

§ 1, 2. Whether dower proceeds from the marriage contract, or is conferred by law.

3, 4. Inchoate dower as an incumbance.

5, 6. Inchoate dower as a right of property.

7-20. Legislative power over inchoate dower.

21. Where the wife does not join, dower governed by the law in force at the date of the husband's alienation.

Whether dower proceeds from the marriage contract, or is conferred by law.

1. It is a point much discussed in the books, whether the right of dower proceeds directly from the marital contract, or is conferred by positive law. Many of the old authorities treat the wife as claiming her dower by virtue of the marriage agreement, taking a distinction in this respect, between dower and tenancy by the curtesy.¹ Thus, according to Gilbert, a tenant by the curtesy claims by the general law of the kingdom, while a tenant in dower claims by the marriage agreement, and a private contract is the origin of her title.² So, Sir Joseph Jekyll, in *Banks v. Sutton*,³ insists "that dower is, and time out of mind has been, a part of the marriage contract when it came to be publicly solemnized;" and that "a right of dower is founded in contract."

¹ Gilb. Uses, 11, 172; Hard. 469; Co. Litt. 30 b. note 7; Ibid. 239 a.; Park, Dow. 102, 103, 342.

² Gilb. Uses, 11. But see post, § 2.

³ *Banks v. Sutton*, 2 P. Wms. 705-6. See vol. i., pp. 372-3, and note.

2. It is agreed by all the authorities, that as to dower *ad ostium ecclesiæ* and *ex assensu patris*,¹ the doctrine above stated is undoubtedly true; for by those modes the wife was expressly endowed by the husband at the time of the marriage, and thereby became invested with an interest somewhat similar in its nature to that created by a jointure of modern times;² but according to the weight of authority it seems clear that this view is not applicable to dower at common law. The true doctrine appears to be tersely stated by Serjeant Nudigate, in a case in Brooke,³ where he says the estate of tenant in dower is made by the law, notwithstanding that she is adjudged in by the baron, for yet this is by the law, and whether the baron will or not. And in the same case, Brooke, J., expressly took the distinction between tenant in dower by the common law and tenant in dower *ex assensu patris* and *ad ostium ecclesiæ*, observing that the former should not be bound by uses [trusts], but the latter should, for they were in by the feoffee, while the other was in the *per* by the baron, and yet *by the law*, and without the act of the baron.⁴ And although, as above shown, Baron Gilbert in one place holds that the right of dower originates in the marriage agreement,⁵ nevertheless, on a subsequent page he states the rule in a different form. "Tenant in dower, as well as tenant by the curtesy," he says, "can not be seized to uses [trusts], because they come to those estates *by the disposition of law* for the advancement and encouragement of matrimony."⁶ The correctness of the reasoning of Sir Joseph Jekyll, quoted in the preceding section, has also been repeatedly questioned.⁷ The result of the English authorities is thus given by Mr. Park:⁸ "It will be observed that this estate arises solely by operation of law, and not by force of any contract express or implied, between the parties; it is the silent effect of the relation entered into by them, not as in itself incidental to that relation, or as implied by the marriage contract, but merely as that contract calls into operation the positive institutions of the municipal law." A similar view has been adopted in the United

¹ See vol. i., ch. i., §§ 14, 20, 28.

² Park, Dow. 342; Bro. Abr. Feoff. al uses, pl. 10; Norwood v. Marrow, 4 Dev. & Bat. L. 442, 450; Lawrence v. Miller, 1 Sandf. S. C. 516; s. c. 2 Comst. 245.

³ Bro. Abr. Feoff. al uses, pl. 10. And see 1 Leon. 61.

⁴ Park, Dow. 102, 103, 342.

⁵ Ante, § 1.

⁶ Gilb. Uses, 171.

⁷ Att.-Gen. v. Scott, Cas. Temp. Talbot, 138; 3 Sugden, V. & P. App. No. 19; Park, Dow. 131, 134, 135; vol. i., p. 373, note, and pp. 377, 378.

⁸ Park, Dow. 5.

States. "There is no contract between husband and wife for curtesy or dower," say the court in *Norwood v. Marrow*.¹ "The interest the one gets in the property of the other, the law gives for the encouragement of matrimony. We have so held with respect to the husband's right to his wife's chattels."² All the old authorities say that the tenant by the curtesy is *in the post*, that is, by operation of law. They are not so well agreed about the wife; some supposing that she is *in* by the husband, or in the *per* by force of the marriage agreement; and others that she, like the husband, takes by force of the general law. . . . It is difficult to distinguish dower at the common law and curtesy, as to their origin. But however the argument may be pursued upon the abstruse point of the old law, how the wife is *in* technically speaking, it is certain, that such as her estate is, the law makes it, without any act of her husband, and against his will." Upon this point there is a general concurrence of the authorities.³

Inchoate dower as an incumbrance.

3. A right of dower, although inchoate, is so far an incumbrance upon the lands to which it attaches as to be within the operation of the ordinary covenant against incumbrances. In an early case in Massachusetts, *Story, J.*, entertained doubts upon this point. "Nor am I prepared," he said, "to admit the doctrine contended for at the bar, that a covenant against incumbrances is broken by the mere existence of a possible incumbrance. . . . A possibility of dower is not, within the sense of the covenant, an incumbrance, for that means a settled, fixed incumbrance."⁴ In *Prescott v. Trueman*,⁵ however, a different conclusion was arrived at. It was there held, that "every right to, or interest in, the land granted, to the diminution of the value of the land, but consistent with the passing of the fee of it by the conveyance, must be deemed in law an in-

¹ *Norwood v. Marrow*, 4 Dev. & Bat. L. 442, 450.

² *Lawrence v. Simmons*, 1 Dev. & Bat. 13.

³ *Lawrence v. Miller*, 1 Sandf. S. C. 516; s. c. 2 Comst. 245; *Moore v. City of N. Y.*, 4 Sandf. S. C. 456; s. c. 4 Seld. 110; *Melizet's Appeal*, 17 Pa. St. 449; *Martin v. Martin*, 22 Ala. 86; *Weaver v. Gregg*, 6 Ohio St. 547; *Noel v. Ewing*, 9 Ind. 37; *Strong v. Clem*, 12 Ind. 37; *Lucas v. Sawyer*, 17 Iowa, 517. But see opinion of Shankland, J., in *Lawrence v. Miller*, 2 Comst. 245.

⁴ *Powell v. Monson & Brimf. Man. Co.*, 3 Mason, 347, 355.

⁵ *Prescott v. Trueman*, 4 Mass. 627.

cumbrance. Of this nature is a claim of dower, which may partially defeat the plaintiff's title, by taking a freehold in one-third out of it." But this general language was qualified, to some extent, by the subsequent case of *Fuller v. Wright*.¹ "Whether, under all circumstances," observed Shaw, C. J., in that case, "an inchoate right of dower, where husband and wife are both living, shall be deemed an incumbrance, is a question which must depend upon the contract and the circumstances. It is true that it is no estate or interest, but only a possibility. But it is a possibility which may give the wife an estate by the happening of a contingent event, the death of her husband, without any new act to be done, or new right to be acquired. . . . We think no general rule can be laid down to determine absolutely whether such inchoate right of dower is an incumbrance; it must depend on many and various circumstances and considerations." Shortly afterwards, however, it was expressly held that a contingent right of dower is an existing incumbrance within the covenant against incumbrances;² and numerous decisions of other courts have established this principle as a settled rule of law.³ It is held, also, that a contingent right of dower is within the covenant of general warranty; and that when

¹ *Fuller v. Wright*, 18 Pick. 405.

² *Shearer v. Ranger*, 22 Pick. 447.

³ *Rawle on Covenants*, 109-11; *Jones v. Gardiner*, 10 John. 266; *Carter v. Denman*, 3 Zab. 260; *Hill v. Ressegien*, 17 Barb. 162; *Stevens v. Hunt*, 15 Barb. 17; *Fitts v. Hoitt*, 17 N. H. 530; *Smith v. Ackerman*, 5 Blackf. 542; *Whisler v. Hicks*, *Ibid.* 100; *Porter v. Noyes*, 2 Greenl. 26; *Donnell v. Thompson*, 1 Fairf. 170; *Bitner v. Brough*, 11 Pa. St. 137; *Barnett v. Gaines*, 8 Ala. 373; *Parks v. Brooks*, 16 Ala. 529; *Shelton v. Carroll*, *Ibid.* 148; *Springle v. Shields*, 17 Ala. 296; *Nance v. Hooper*, 11 Ala. 552; *Beavers v. Smith*, *Ibid.* 20; *McLemore v. Mabson*, 20 Ala. 137; *Thrasher v. Pinckard*, 23 Ala. 616; *Greenwood v. Ligon*, 10 Smedes & M. 615. See, also, *Duvall v. Craig*, 2 Wheat. 45; *Ketchum v. Evertson*, 13 John. 359; *Massey v. Craine*, 1 M'Cord, 489. In a South Carolina case it was said, that inchoate dower is no breach of the covenant of seizin. *Lewis v. Lewis*, 5 Rich. L. 12. In the case of *Nyce v. Obertz*, 17 Ohio, 71, *Hitchcock, J.*, inclined strongly to the opinion that a contingent right of dower is not embraced by a covenant "that the premises are free and clear from all incumbrances whatsoever," though he left the point undecided. He admitted, however, that such an interest is within the covenant against incumbrances employed by English conveyancers, which in express terms extends to dower and rights of dower. The point determined was, that even assuming a contingent right of dower to be within the covenant, a decree in favor of the dowress against the covenantee, for a gross sum, not charged upon the land, is not such a breach as will give *actual* damages. The question whether, where the form of the covenant is *in praesenti*, the existence of an inchoate dower interest constitutes a *technical* breach, so as to entitle the party to nominal damages and costs, seems to have been overlooked. See *Rawle on Covenants*, 113, 114.

the right has become absolute, and is prosecuted to an eviction, actual or constructive, a breach of that covenant is worked.¹

4. So where a party has contracted to convey lands with covenants of general warranty, or against incumbrances, an existing right of dower, although inchoate, will constitute a good defence to a proceeding on the part of the vendor for a specific performance of the contract, unless the vendee has waived his right to object to the title.² The rule is the same where the vendor institutes an action at law against the purchaser to recover damages for nonperformance of the contract.³ So, after the dower right has become consummate, if the vendee see proper to insist upon performance, he may go into a court of equity to have the dower claim settled, and compensation therefor decreed out of the unpaid purchase money in his hands.⁴

Inchoate dower as a right of property.

5. It is difficult to state with precision the nature or qualities of an inchoate dower interest when considered as a right of property. A certain vagueness of expression uniformly characterizes the discussions of the subject, and these discussions are commonly attended with unsatisfactory results. "It is not easy," says a distinguished jurist, "to define the right of dower before the death of the husband. . . . It is not only an inchoate right, but contingent. It depends upon the death of the husband. If he survive his wife, she has no right transmissible to her heirs, nor during the life of her

¹ Rawle, Cov. 238, 239, 252, 253; Leary v. Dunham, 4 Geo. 593; Tuite v. Miller, 5 West. Law Jour. 413; Johnson v. Nyce, 17 Ohio, 66; Wilson v. Taylor, 9 Ohio St. 595. So where dower is claimed and assigned, or the value thereof assessed, a covenant for quiet enjoyment contained in a deed of conveyance of the land, is broken. Lewis v. Lewis, 5 Rich. L. 12.

² Rawle on Cov. 112, 113; Fuller v. Wright, 18 Pick. 405; Barnett v. Gaines, 8 Ala. 374; Parks v. Brooks, 16 Ala. 529; Springle v. Shields, 17 Ala. 295; McLemore v. Mabson, 20 Ala. 137; Greenwood v. Ligon, 10 Smedes & M. 615; Bitner v. Brough, 11 Pa. St. 137. But see dictum of Hitchcock, J., in Nyce v. Obertz, 17 Ohio, 71, 75. See, also, Ketchum v. Evertson, 13 John. 359. In Brown v. Starke, 3 Dana, 316, it was held that a potential claim to dower is not such an incumbrance on the land as will, in all cases, preclude a decree in favor of a vendor seeking to enforce his contract.

³ Porter v. Noyes, 2 Greenl. 26; Bitner v. Brough, 11 Pa. St. 137; Jones v. Gardiner, 10 John. 266; Rawle on Cov. 112, 113.

⁴ Springle v. Shields, 17 Ala. 295; Thrasher v. Pinckard, 23 Ala. 616; Stevens v. Hunt, 15 Barb. 17; Hill v. Ressegien, 17 Barb. 162.

husband can she give it any form of property to her advantage. . . So long as the husband shall live, it is only a right in legal contemplation, depending upon the good conduct of the wife and the death of the husband. Until the death of the husband, the right—if it may be called a right—is shadowy and fictitious, and, like all rights which are contingent, may never become vested.”¹ Similar language is employed by the court in the case of *Moore v. The City of New York*.² It is there said that the inchoate interest of the wife is “a right to a claim for dower, contingent upon her surviving her husband. Such a possibility may be released, but it is not, it is believed, the subject of grant or assignment; nor is it in any sense, an interest in real estate. It is not of itself property, the value of which may be estimated, but an inchoate right, which, on the happening of certain events, may be consummated so as to entitle the widow to demand and receive a freehold estate in the land.”³

6. The difficulty of assigning an inchoate dower interest its appropriate place in the classification of estates and rights of property, is manifest from the language above quoted. In both opinions it is spoken of as a mere *right*—not an estate,—but in the case last cited it is declared not to be, in *any* sense, an interest in land, nor of itself property capable of an estimated value. The correctness of the proposition thus broadly stated may well be doubted. The right of dower, if it be a right at all, must in *some* sense, be an interest in land. We have already seen that according to established law, it is an *incumbrance*, and of itself works a technical breach of the covenant against incumbrances,⁴ a rule difficult to be reconciled with the idea that inchoate dower is not, in any sense, an interest in real estate. That the annuity tables furnish data from which to compute the probable present value of such an interest, is also entirely clear.⁵ In some of the States the inchoate right of dower is so far regarded as property, entitled to the protection of the law, that by express enactment the interest of the

¹ McLean, J., in *Johnston v. Vandyke*, 6 McLean, 422.

² *Moore v. The City of New York*, 4 Seld. 110; s. c. 4 Sandf. S. C. 456.

³ See, also, *Weaver v. Gregg*, 6 Ohio St. 547; *Powell v. Monson & Brimf. Man. Co.*, 3 Mason, 347, 355; *Fuller v. Wright*, 18 Pick. 405.

⁴ Ante, §§ 3, 4.

⁵ McKean's Pr. L. Tables, 23, § 4; Hendry's Ann. Tables, 87, Prob 4; *Jackson v. Edwards*, 7 Paige, 386, 408-10; *Bartlett v. Van Zandt*, 4 Sandf. Ch. 396. See vol. i., ch. xvi., §§ 22, 23; post, Appendix, H.

wife is secured to her where sales occur under legal proceedings instituted in the lifetime of the husband.¹ And it has been held, under a statute of the character just referred to, that where the present value of the wife's inchoate interest has been ascertained, and a sum reserved from the proceeds of the sale on account thereof, the amount thus set apart becomes her absolute property.² So, in an early case it was decided, that inchoate dower was so far a potential right of property that it was not divested by the revolution which resulted in a separation of the American Colonies from Great Britain, although in consequence of that separation, the demandant became an alien, and as such was not entitled to dower in the lands subsequently acquired by her husband.³ "I distinguish," said Chancellor Kent, "between the capacity to acquire, and the vested right. The revolution took away the one, and did not impair the other." And where the wife joined her husband in a conveyance of his lands, releasing her dower interest therein in consideration of the conveyance to her of other lands, it was held, that although the transaction of the husband might be regarded as fraudulent as to creditors, yet to the extent of the value of the interest surrendered by the wife, she should be protected.⁴ So where the husband mortgaged his land, and in consideration of his wife's releasing her right of dower to the mortgagee, conveyed the equity of redemption to a stranger in fee for the benefit of his wife, but by a deed containing no declaration of the trust, and purporting to be for the consideration of a sum of money, it was held, as against creditors of the husband, that the relinquishment of the right of dower was a valid consideration for the conveyance of the equity of redemption; that parol evidence was admissible to show what was the true consideration; that if the transaction was in fact so made, was honest, and the value of the right of dower equivalent to that of the equity of redemption, the conveyance was valid.⁵ Referring to the inchoate right relinquished by the wife, the court remarked: "It was a valuable interest which is frequently the subject of contract and bargain; it was an interest which the law

¹ 3 Rev. Stat. N. Y. 5 ed., p. 614, § 65; Stat. Minn. (1858,) p. 602, §§ 36, 37; Code Va. (1849,) p. 474, § 3; 1 Md. Code, p. 78, § 33. See vol. i., ch. xvi., §§ 31, 32; ch. 23, § 30.

² *Bartlett v. Van Zandt*, 4 Sandf. Ch. 396. See, also, vol. i., ch. xxiii., §§ 31-33.

³ *Kelly v. Harrison*, 2 John. Cas. 29.

⁴ *Quarles v. Lacy*, 4 Munf. 251.

⁵ *Bullard v. Briggs*, 7 Pick. 533.

recognizes as the subject of conveyance by fine in England, and by deed with us. It is more or less valuable, according to the relative ages, constitutions, and habits of the husband and wife. It is more than a possibility, and may well be denominated a *contingent interest*." And the general doctrine is, that a contract between husband and wife, by which she receives money or property, in consideration of releasing her contingent right of dower in the husband's lands, if reasonable, and fairly entered into, will be sustained in equity.¹ In Kentucky, the courts have gone so far as to sustain a bill by the wife during the lifetime of the husband to set aside and declare void a conveyance fraudulently executed by him in contemplation of marriage, for the purpose of defeating her dower.² Although, therefore, an inchoate right of dower can not be properly denominated an *estate* in lands, nor indeed a *vested* interest therein, and notwithstanding the difficulty of defining with accuracy the precise legal qualities of the interest, it may nevertheless be fairly deduced from the authorities, that it is a substantial right, possessing, in contemplation of law, the attributes of property, and to be estimated and valued as such.³

Legislative power over inchoate dower.

7. Intimately connected with this subject is the question of the extent of the legislative power over the inchoate right of dower, a question which has undergone judicial consideration in several cases contained in the American reports. In *Jackson v. Edwards*,⁴ in discussing the effect of sales in partition, and whether, under the

¹ See the following additional cases in which this point is ruled: *Garlick v. Strong*, 3 Paige, 440; *Harvey v. Alexander*, 1 Rand. 219; *Taylor v. Moore*, 2 Rand. 563; *Blow v. Maynard*, 2 Leigh, 29, 47; *Caldwell v. Bower*, 17 Misso. 564; *Hoot v. Sorrel*, 11 Ala. 386; *Williams v. Williams*, 3 West. Law Month. 157; *Ward v. Crotty*, 4 Met. (Ky.) 59; *Nims v. Bigelow*, 45 N. H. 343. A promissory note given to the wife by the purchaser in consideration of the release by her of her contingent dower interest, will be protected from her husband's creditors. *Nims v. Bigelow*, *supra*. But where, after the death of her husband, the wife alleged that during his lifetime she had relinquished her dower in a portion of his estate, upon the faith of a verbal promise by him that he would compensate her therefor, and filed a bill against his representatives for specific performance, it was held that parol evidence was inadmissible to establish the alleged agreement. *Hall v. Hall*, 2 McCord's Ch. 269.

² *Petty v. Petty*, 4 B. Mon. 215.

³ See Cord on Rights of Married Women, p. 265, note.

⁴ *Jackson v. Edwards*, 7 Paige, 391.

statutes of New York, they divested inchoate dower, McCoun, Vice Chancellor, said: "It is undoubtedly competent for the legislature to provide by law for divesting a wife in these cases of her right of dower in lands held in common by her husband. The legislature may, indeed, abolish the common law right of dower altogether." In the Court of Errors, where the case was afterwards taken, Bronson, J., expressed these views: "It may well be provided by law that a particular description of estate shall not be created in future, but it is quite a different question whether a legal estate already existing can be taken from one and given to another."¹ Upon the same point Senator Verplanck reasoned as follows: "The right of dower, like all other rights of property, whether actual, initiate, or contingent, is subject to such alterations or modifications of its future character as the policy of the statute law may prescribe. Inchoate rights of dower, like other rights if vested before the enactment of a new statute, may be beyond its operation. I will not venture thus extra-judicially to say how far, and when, such an exemption from a new statute would apply as to prior rights; but certainly all other rights of dower, like all other estates acquired after the passing of a statute, must be wholly governed and modified by it."² The case of *Lawrence v. Miller*,³ arose under the provisions of the Revised Statutes of New York, directing a sale of lands of a decedent for the payment of his debts, and requiring the widow's dower to be included in the sale, she to receive, in lieu of her interest in the lands, a proportionate share of the proceeds of the sale. The principal question was whether these provisions applied to a case where the inchoate dower right had attached before the enactment took effect, although the husband had died subsequently, and where dower by metes and bounds had been actually assigned to the widow upon her application, before the institution of proceedings for a sale. For the widow, it was argued, that her dower attached upon the land at the moment of its acquisition by the husband, as an incident of, and a right conferred by the marriage contract; and therefore that she could not be compelled to surrender her interest in the lands and receive an equivalent in money without a plain infraction of the provisions of the State and Federal

¹ *Jackson v. Edwards*, 22 Wend. 498, 513.

² *Jackson v. Edwards*, 22 Wend. 519.

³ *Lawrence v. Miller*, 1 Sandf. S. C. 516; s. c. 2 Comst. 245.

Constitutions. But the Superior Court decided adversely to this proposition. "The plaintiff," the court said, "did not marry on the strength of this property, or any other property. The law presumes her to have been impelled by higher and purer motives, to enter into the marriage relation. The rights she acquired were only such as the law had attached to her condition. The same power that created them from motives of public policy or municipal regulation, can alter, or change, or even destroy them, from the same motives. . . . Though marriage is a contract, it differs from other contracts in this, that the rights, obligations and duties arising from it are not left entirely to be regulated by the agreement of the parties, but are, to a certain extent, matters of municipal regulation, over which the parties have no control by any declaration of their will." But in the Court of Appeals, the judgment of the Superior Court was reversed, that court holding that the statute had no application as against the widow where dower had been assigned before proceedings had been commenced for an order of sale. And Shankland, J., in discussing the points involved, added: "But there is another reason, in my opinion, for limiting the operation of the Act in question to cases of marriage occurring after the first of January, 1830, more potent than any of those above rendered. It is, that if the Act should be construed to include the cases of dower where the marriage and seizin of the husband occurred prior to the passage of the Act, it would be void by the provisions of the tenth section of the first article of the Constitution of the United States. That section declares that no State shall pass any law impairing the obligation of contracts; and as the widow's right to dower is a right acquired by the marriage contract, and one of the benefits promised to her by the law of the contract, in consideration of her entering into that relation, it comes fairly within the letter and spirit of the prohibitory clause of the Constitution, as a contract which can not be impaired by subsequent legislation. The right of dower attaches at the instant of the marriage, and can not be defeated by the alienation of the husband alone. In the case of *Kelly v. Harrison*,¹ the principle was established, that by the marriage and seizin of the husband, the wife's right to dower became a vested right, and could not be impaired by the subsequent acts of the Government, and of course, not by subsequent legisla-

¹ *Kelly v. Harrison*, 2 John. Cas. 29.

tion. . . . The law of dower which existed at the time of the marriage and seizin of the husband is the law of the contract which they entered into, and the courts should give such a construction to State legislation, if possible, as not to make it conflict with constitutional provisions." The court, however, did not pass upon the constitutional question, placing their decision upon the ground before stated, that an application for authority to sell the dower interest of the widow came too late after there had been an assignment by metes and bounds.¹

8. In *Moore v. The City of New York*,² lands of the husband had been appropriated to public uses under the authority of a legislative enactment, and the entire value estimated by the commissioners appointed under the statute, paid to the husband. In a proceeding for dower instituted by the wife after the death of her husband, it was held, that by these proceedings her contingent right was divested.³ In the opinion delivered in the Superior Court, it was said: "The right being merely an incident to the marriage relation, it seems to us that while that right is thus inchoate, and before it has become vested by the death of the husband, any regulation of it may be made by the legislature, though its operation is, in effect, to divest the right; the marriage relation itself being within the power of the legislature to modify or even abolish it." In the Court of Appeals similar views were expressed. "Dower is not the result of contract," observed Gardiner, J., "but a positive institution of the State, founded on reasons of public policy. To entitle to dower, it is true, there must be a marriage, which our law regards in some respects as a civil contract. So the death, and seizin of lands by the husband during coverture are also necessary to establish a right to this estate. But they are not embraced by, nor are they the subjects of the marriage contract. The estate is by law made an incident of the marriage relation, and the death and seizin of one of the parties are conditions on which it comes into existence. It stands, like an estate by the curtesy, on the foundations of positive law. . . . It is because dower is an incident of the marriage relation, established by positive institutions of the country, and not by contract, that the widow is entitled to

¹ Jewett, C. J., and Bronson and Hoyt, JJ., dissented. See, also, *Lawrence v. Brown*, 1 Seld. 394.

² *Moore v. The City of New York*, 4 Sandf. S. C. 456; s. c. 4 Seld. 110.

³ See vol. i., ch. xxvii.

dower, although the marriage is consummated abroad, where the common law does not obtain.”¹

9. In an early case in New Hampshire, the court incidentally alluded to this subject in the following terms: “The right to prosecutions in a particular time, or manner, may, perhaps, be modified, or taken away at any period before actions are commenced. So, also, may the rights of *femmes covert* to dower at any period before the death of their husbands; and so the right of the next akin to a relation’s estate, at any period before the relation’s death. But it is questionable whether even these rights, though inchoate and in mere expectancy, can be taken from one portion of the community and be left unmolested with another portion.”² In a recent case in Maine, the question was whether the statute of 1841³ restricting the widow’s right of dower in lands mortgaged by the husband before marriage, to the value of the estate, after deducting the amount paid for the redemption of the mortgage, applied where the mortgage had been redeemed before the passage of the Act. It was held that it applied to all cases where the death of the husband occurred after the statute took effect. The court said: “At the time when the mortgage was discharged, the demandant had an inchoate right of dower in the premises in which dower is demanded. But it was only an inchoate right, subject, before it was matured, to be modified, changed, or even abolished by legislative enactment. It could not have matured until the decease of the husband, which was on October 26, 1854, prior to which time, namely, on August 1, 1841, our Revised Statutes went into operation.”⁴ So in Pennsylvania, it has been held, that “there is no constitutional provision guarding the common law right of dower; it is not part of the marriage contract. It results from wedlock by the operation of existing laws at the time of the husband’s death.”⁵ In *Philips v. Disney*,⁶ determined in Ohio, one ground of defence insisted upon was, that as by the statute of 1824, “regulating dower,” all former laws on the subject were repealed without any saving clause, and as the premises in controversy were conveyed previous to the enactment of that law, there was no seizin of the husband after that date, to which a right of dower could attach. The point was left

¹ *Moore v. The City of New York*, 4 Seld. 110.

² *Merrill v. Sherburne*, 1 N. H. 199, 214.

³ Rev. Stat. Maine, ch. 95, § 15.

⁴ *Barbour v. Barbour*, 46 Maine, 9.

⁵ *Melizet’s Appeal*, 17 Pa. St. 449.

⁶ *Philips v. Disney*, 16 Ohio, 639, 654.

undecided, the court remarking that they were not prepared to say that the position could be sustained. But Hitchcock, C. J., added: "There can, as it seems to me, be no doubt that the General Assembly have the power to change the law of dower, and so to change it that a widow may be endowed of one-half or more of the real estate of which her husband shall be seized after the change, and during coverture, or that she may be endowed only of the estate of which he may die seized. And such law would be effective and operative in all cases except such in which the dower right had become vested by the death of the husband previous to the enactment of the law." In the late case of *Weaver v. Gregg*,¹ in the same court, the ruling in *Moore v. The City of New York*,² was followed and approved.³

10. This question has also undergone judicial inquiry in the courts of Indiana, on several occasions. By the Revised Statutes of 1852, of that State, tenancy in dower is abolished, and a fee simple estate in one third of the husband's lands substituted in its stead.⁴ The question arose whether this enactment applied to all lands of which the husband was seized after it took effect, including those acquired prior thereto. The court held that the law in force at the dissolution of a marriage by death, is the measure of the rights of the survivor: that marriage is not simply a contract, but a public institution, not reserved by any constitutional provision from legislative control; and all rights in property growing out of the marriage relation, are alike subject to regulation by the legislative power: that the legislature is competent to increase or diminish dower, or to substitute a larger estate for it, or even to abolish dower inchoate altogether. And as the result of these premises, it was determined, that where the husband died subsequently to the date when the statute became operative, the widow—no rights of creditors intervening—takes one-third of his real estate in fee.⁵ In discussing the points involved, the court remarked: "Some confusion has arisen from confounding the contract to marry with the marriage relation itself. And still more is engendered by regarding husband and wife as strictly parties to a subsisting con-

¹ *Weaver v. Gregg*, 6 Ohio St. 547.

² *Moore v. The City of New York*, *supra*.

³ See, also, *Little Miami R. R. Co. v. Jones*, 5 Weekly Law Gaz. N. S. pp. 5, 7.

⁴ 1 Rev. Stat. Ind. (1852,) ch. 27, p. 250, §§ 16, 17. See vol. i., ch. ii., § 28.

⁵ *Noel v. Ewing*, 9 Ind. 37.

tract. At common law, marriage as a *status* had few elements of contract about it. For instance, no other contract merged the legal existence of the parties into one. Other distinctive elements will readily suggest themselves, which rob it of most of its characteristics as a contract, and leave it simply as a *status* or institution. As such, it is not so much the result of private agreement as of public ordination. In every enlightened government, it is pre-eminently the basis of civil institutions, and thus an object of the deepest public concern. In this light marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity. Hence, as between husband and wife, there is no constitutional provision protecting the marriage itself, or the property incident to it, from legislative control, by general law, upon such terms as public policy may dictate. The sovereign power may, by general enactment, regulate and mould their relative rights and duties at pleasure. And the statute in force at the dissolution of the marriage by death, is the measure of the survivor's rights." Perkins, J., dissented, holding that the law should be construed to operate prospectively, only. "At the time of the marriage of the parties," he said, "and the purchase of the property in question, the entire fee simple in real estate purchased by the husband, became by law his—vested in him. He could convey it by deed while living, and by will at death, subject only to the wife's right of dower—a right to the use of one-third of it during such period of time as she might outlive her husband. By a law passed after the marriage, and after the purchase of the property, the husband was deprived, if the law is to operate immediately, of the right of conveying by deed or will, one-third of the fee simple of his property; and the existing dower right of the wife was enlarged to a contingent right in fee simple to one-third of such property. . . . In effect the statute transfers from the husband to the wife, one-third of the fee in his real property, but subject to revert to him should he survive her. This is substantially the transfer of the property of one person to another, by the legislature. But it has been said that the husband and wife are two persons in one, and hence that transferring property from one to the other of them, can not be regarded in the light of an ordinary case of transferring it from one individual to another. The proposition is not true. However closely connected should be the union of husband and wife, (and it can not be too close—the merger

of the individual too complete), still it must be conceded to be settled law, that as to rights of property, the husband and wife are regarded as two persons, having separate interests. This is admitted equally by those who hold marriage a contract, simply, and those who hold it a contract and *status* combined, and those who hold it a sacrament. . . . The respective rights of property, then, in husband and wife, are protected by the Constitution, as are the rights of property in other individuals. . . . In the view I have taken of the case, it has not been necessary to speak of the wife's contingent-right of dower. Perhaps the legislature might change that as against her. The question here is upon the right of the legislature to deprive the absolute owner of property of the right to dispose of it, no public necessity or interest intervening to be subserved."

11. In a subsequent case arising under the same statute, the question of the legislative power to abolish inchoate dower, was fairly presented and determined. A husband, prior to the taking effect of the Act in question, was the owner of lands, and conveyed them in fee simple, his wife not joining, and died after the statute went into operation. It was held that the widow could take neither dower nor one-third in fee.¹ The following is from the opinion delivered in the case: "The land in question was owned by the husband in 1844, a point of time during the coverture,—was conveyed by him in that year, and the wife did not join in the deed. And had the law at the death of the husband, remained the same as it was when the land was conveyed, the widow would have been entitled to a life estate in one-third of the land—being a dower estate. But the law did not remain the same. On the 6th of May, 1853, it was changed; dower was abolished, and the right to a fee simple substituted in place of the right to dower. And the question is whether this latter statute operated to enlarge the estate of the widow into a fee in lands conveyed by the husband while the wife had but an inchoate dower right. For, under the decision in *Noel v. Ewing*,² the widow in this case has a fee simple right or nothing. In that case it was decided that the Act of 1853 was not prospective, but immediate in its operation. . . . That inchoate rights of dower were abolished; and all the judges conceded the power of the legislature to abolish such rights, because they were

¹ *Strong v. Clem*, 12 Ind. 37.

² *Noel v. Ewing*, *supra*.

not consummate. . . . It did not decide the question now before the court. In the *Ewing* case, the husband had not conveyed the land for a consideration before the new Act took effect. In the case now before the court he had." After showing that the statute could not affect the vested rights of the purchaser, the court proceeded: "The plaintiff, then, can not maintain this action upon the dower right of the widow. That never vested. Before the death of her husband, the event necessary to the consummation of that right, the right itself was abolished by law. The law came in the place of the death of the wife, and determined the contingency as to the vesting of dower in favor of the purchaser of the land. The plaintiff can not maintain his action upon the fee simple right, as it never vested. . . . The statute attempting to create that estate being, so far as applicable to this case, void."¹

12. In the case of *Burke v. Barron*,² the question was adverted to, but not decided. In the subsequent case of *Lucas v. Sawyer*,³ the Iowa court adopted in its fullest extent, the doctrine applied to the cases determined in Indiana, and held that the dower right of the wife may, at any time before the husband's death, be enlarged, abridged, or entirely taken away. In *Johnston v. Vandyke*,⁴ Wilkins, J., expressed a decided opinion that an inchoate right of dower is beyond legislative control. "As the law treats marriage in no other light than as a civil contract," he observed, "between parties able and willing to contract, and although the husband and wife are as one person as to many legal consequences of their union, yet the latter is, at the time of the contract, vested with a personal individual interest in her husband's real estate, which the law shields and protects for her exclusive benefit. This right is always implied, and in many ecclesiastical nuptial celebrations it is expressed in '*totis verbis*;' 'of all my worldly estate I thee endow,' can not be considered as mere words of ceremony without substantial meaning. It is a right inchoate, then, at the time of the marriage; suspended during coverture, yet untransferrable without her consent; attaching to the realty as a valid title of an estate for life, on the death of her husband, and can only be barred by her own

¹ Approved and followed in *Logan v. Walton*, 12 Ind. 639; *Giles v. Gullion*, 13 Ind. 487; *Frantz v. Harrow*, Ibid. 507; *Strong v. Dennis*, Ibid. 514. See, also, *Kennerly v. Misso Ins. Co.*, 11 Misso. 204.

² *Burke v. Barron*, 8 Clarke, (Iowa), 132.

³ *Lucas v. Sawyer*, 17 Iowa, 517.

⁴ *Johnston v. Vandyke*, 6 McLean, 422.

act, and not by subsequent legislative provisions." But the case did not call for a decision upon this point.¹ In a case determined in Georgia, the court thus referred to the rights of the wife in the estate of her husband: "Dower is a favorite of the law. The Acts of 1841 and 1850, show how cautious our own legislature has been, not to interfere with the right, forcibly and against the will of the wife, and that too, even in cases where there would seem to be an apparent necessity to do so. Her consent to take money in lieu of dower, would seem to be indispensable in all cases. True the right of Mrs. Cyrus A. Royston is inchoate; still, it is not contingent; she can not be deprived of it, neither by the act of her husband, nor of the law. To divest her of it, her voluntary relinquishment must be procured."² So in *Moreau v. Detchmندی*,³ the court held that rights of property attaching in virtue of the marriage agreement, can not be abrogated by subsequent legislation.

13. The foregoing comprise all the cases in which this question is discussed that have fallen under the observation of the writer. The spirit of innovation prevailing in many of the States, as manifested by the numerous legislative provisions which have been adopted on the subject of marital rights, has invested it with no ordinary degree of importance; and for this reason the views and arguments of the courts with regard to it, have been liberally reproduced in these pages. While it may be conceded that a majority of the adjudged cases sanction the proposition that inchoate dower rights are subject to the legislative power, and may be divested by its exercise, the nature of the interests involved, and the gravity of the question itself, seem to justify an examination of the grounds upon which those cases have proceeded.

14. Much of the reasoning by which it is sought to establish the legality of this power, is directed to the support of the doctrine that the right of dower does not spring from any contract of the parties; in other words, that the parties to a marriage are not to be understood as stipulating, as a part of the marriage agreement, that the wife shall have dower according to the law then in force; but is created solely by positive law; and from these premises the result is deduced, that it may be controlled by the same power from which

¹ McLean, J., who participated in the determination of the case, inclined to the opinion that inchoate dower may be divested by the exercise of the legislative power.

² *Royston v. Royston*, 21 Geo. 161. ³ *Moreau v. Detchmندی*, 18 Misso. 522.

it derives its existence. What the law creates, that it may destroy, is the pith and substance of the argument.

15. That dower does not proceed from the marriage contract, and that it is the creature of municipal law, has been already shown.¹ But it may be doubted whether this is material to the correct solution of the question under consideration. Whether an estate, or a right of property, is conferred by law, or by contract, seems an unimportant inquiry with reference to the question of the constitutional power of the legislature to divest it. In one sense, ordinary contracts become operative and create mutual rights and obligations by force of positive law. It is by express enactment that certain terms and formalities employed in the execution of deeds and wills have the effect to transmit titles to real estate. The Statute of Uses of Henry VIII., affords a striking illustration of this. Before that statute the *cestui que use* took a mere equitable interest under the conveyance. The statute, by force of its operative power, instantly executed the use by clothing him with the legal title. Similar enactments are in force in several of the States.² Under their provisions, a deed executed to A. in trust for B., will immediately invest B. with a legal title. What difference does it make, with respect to rights of property, whether they flow, by force and operation of law, from the observance of certain formalities, or attach, by operation of law, as an incident to a particular relation? If the law declare that the delivery of an instrument of writing known as a deed, containing particular words and executed in a particular manner, shall pass to the grantee an estate in fee simple, or that a contract of marriage shall confer upon the wife an estate for life in the lands of her husband, where is the difference, in principle, as to the rights of the respective parties in whose favor the estates attach? It is true, that in the one case, a life estate only, is created; but this consideration goes merely to the value of the estate—not to the question of the right to its enjoyment.

16. It will not be pretended that an estate in fee created by deed can be divested by the legislative power, except for a public use and upon just compensation. Neither will it be claimed that an estate in fee created by force of the Statute of Uses, can be impaired by that power except for a similar purpose.³ If the law invested

¹ Ante, §§ 1, 2.

² Vol. i., ch. xix., §§ 3, 19; ch. xii., § 29.

³ See *Fletcher v. Peck*, 6 Cranch, 87; *Butler v. Palmer*, 1 Hill, 324; *Gillmore v. Shooter's Exr.*, 2 Mod. 310; *Couch, q. t., v. Jeffries*, 4 Burr. 2460; *Churchill v. Crease*,

the wife, upon her marriage, with an absolute right in fee simple in a portion of her husband's lands, could that right be interfered with by subsequent legislation? That it could not is virtually conceded by the reasoning in all the cases upon the subject;¹ for it is uniformly held, that as soon as the inchoate right has become consummate by the death of the husband, it is beyond the reach of legislative action. And yet an absolute right of dower is as much a creature of the law as an inchoate right. In neither case does the interest proceed from any agreement, express or implied, of the parties. The assumption, therefore, that inchoate dower may be abolished by law, because it is created by law, does not seem to be well founded; for upon that principle dower might be divested as well where it was consummate as where it was contingent.

17. Upon what ground, then, may this legislative power be constitutionally exercised? If dower consummate is not subject to it, and dower inchoate is, consistency requires that the distinction taken should be placed on the actual or supposed difference in the nature of the two rights. This view, it will be perceived, has no reference to the manner in which the interest is created or the source from which it is derived, but to the inherent qualities of the right itself. If inchoate dower may be controlled or impaired simply because of its uncertain and contingent nature, the mode or manner in which it is brought into existence,—whether by deed or by statute,—is wholly immaterial. Suppose, then, that by an ordinary deed an estate for life in certain lands, properly supported by a particular estate, is given to the wife, contingent upon the event that she survives her husband. Could the right thus conferred be divested by legislation? And yet in the case supposed, the interest created by deed is contingent, precisely as a dower interest created by law is contingent. Interests of a similar character are frequently created by deed or will; and that they can not be affected by legislation is believed to be entirely clear.

18. It has been already shown that inchoate dower is a valuable right, and regarded as such by the courts and the law.² When the marriage takes place it attaches at once upon all the lands of which the husband is then seized. It attaches also upon all lands subsequently acquired by him the instant that he is clothed with the

2 Moore & Payne, 415; s. c. 5 Bing. 177; *Terrington v. Hargreaves*, 3 Moore & Payne, 137, 143; s. c. 5 Bing. 489; *Hawthorn v. Calef*, 2 Wall. 10.

¹ See post, ch. ii., § 3.

² Ante, § 6.

title. By the common law, when lands are conveyed to the husband, the contingent interest of the wife is held to be impliedly embraced in the grant; and a provision that she shall not have dower is considered as repugnant thereto, and therefore void.¹ In respect of the inchoate interest thus invested in the wife by virtue of the conveyance to the husband, she has been regarded as a purchaser, and as such entitled to the benefit of statutory privileges extended to alien purchasers.² The right, when once fixed, is paramount to all subsequent titles derived through the husband. In several of the States it is protected upon sales made in legal proceedings in the lifetime of the husband.³ An agreement to release it forms a good consideration for an undertaking to pay money or convey lands to the wife.⁴ It constitutes an incumbrance for which the vendee may insist upon a proportionate deduction from the purchase money of the estate.⁵ Thus recognized and established as a valuable *property* interest, it would seem reasonable that it should receive the same protection against legislative encroachment as is extended to other rights of property. Legislation abolishing dower, or modifying it to the prejudice of the wife, should, it is believed, be held to operate prospectively only.⁶

19. That inchoate dower is subject to the exercise of the right of eminent domain, as held in *Moore v. The City of New York*,⁷ is

¹ Vol. i., ch. xiii., §§ 12, 13; ch. xiv., § 1. In *Chudleigh's case*, 1 Co. 123 b., curtesy and dower are spoken of as estates "created by law *in consideration of marriage*."

² *Sutliff v. Forgey*, 1 Cowen, 89. In this case, Woodworth, J., said: "It can not, I think, on any principle of sound construction be said that the demandant is not a purchaser of this right of dower as clearly as that her husband became seized of the fee." And see *Forgey v. Sutliff*, 5 Cowen, 713; ante, vol. i., ch. 9, § 29.

³ Ante, § 6.

⁴ *Smith v. Smith*, 5 Ves. Jr. 189; *Bullard v. Briggs*, 7 Pick. 533; *Garlick v. Strong*, 3 Paige, 440; *Quarles v. Lacy*, 4 Munf. 251; ante, § 6.

⁵ Ante, §§ 3, 4.

⁶ See Cord on Rights of Married Women, p. 265, note. In some of the cases in which this subject is discussed, reference is made to decisions in Massachusetts, sustaining the constitutionality of retroactive statutes abolishing estates in joint tenancy, and converting them into estates in common. *Holbrook v. Finney*, 4 Mass. 566; *Miller v. Miller*, 16 Mass. 59; *Burghardt v. Turner*, 12 Pick. 534. But this appears to have been upon the ground that the change was to the advantage of the parties in interest, an estate in common being regarded as more beneficial to the tenants than an estate in joint tenancy. See *Burke v. Barron*, 8 Clarke, (Iowa), 132.

It is worthy of observation that in the late English Dower Act, no attempt was made, even by the exercise of Parliamentary powers, to interfere with existing rights. See vol. i., Appendix, § 14.

⁷ *Moore v. The City of N. Y.*, 4 Seld. 110; ante, § 8; vol. i., ch. xxvii., §§ 4, 5.

undoubtedly true ; for in this respect it stands upon the same footing as other property. But according to the views here expressed, the wife should be compensated therefor. It may be that after the value of the entire estate is ascertained, and the amount paid over to the proper legal authority,—particularly if she is a party to the proceeding,—her right is transferred from the land to the money representing it, precisely as it is divested in a sale in foreclosure under a mortgage valid against her ; and that if she fail to assert her right to a portion of the fund, or if the authority through whose agency the appropriation to public uses is made, neglect or refuse to protect her interest, she can not afterwards set it up against the land. If the court should err in adjudging upon her rights, her remedy is in another tribunal.

20. These views are supported, to some extent, by the rule adopted with respect to the marital rights of the husband. It has been repeatedly held, that the right of the husband to reduce to possession existing choses in action of the wife, can not be taken away by legislation. In the Court of Appeals of New York, where this question was fully considered, Edwards, J., said :¹ “ This right, it is true, is personal, and no one can exercise it but the husband himself, or his assigns, or, under certain circumstances, his representatives. It is not a right which can be taken in execution.² Neither will a court of equity compel a husband to exercise it in favor of creditors.³ But it is none the less valuable to the husband on that account. . . . I think that the right of the respondent to recover the legacy of his wife, which existed at the time that the statute in reference to married women went into operation, was properly within the meaning of the Constitution, and that he has not been deprived of it by the statute.” Denio, J., concurred. “ I am of opinion,” he said, “ that the Act, in its application to this case, is a violation of the Constitution of this State. Among the limitations of the powers of the Government contained in that instrument is the one which declares that ‘ no person shall be deprived of life, liberty or *property*, without due process of law.’⁴ . . . This provision was designed to protect the citizen against all mere acts of power, whether flowing from the legislative or executive branches of the Government. It does not, of course, touch the right of the

¹ Westervelt v. Gregg, 2 Kern. 202.

³ Gallego v. Gallego, 2 Brock. 285.

² Price v. Sessions, 3 How. 624.

⁴ Const. N. Y., Art. 1, § 6.

State to appropriate private property to public use upon making due compensation, which is fully recognized in another part of the Constitution ; but no power in the State can legally confer upon one class of persons, the property of another person or class, without their consent, whatever motives of policy may exist in favor of such transfer.”¹ &

Where the wife does not join, the right of dower is governed by the law in force at the date of the husband's alienation.

21. This point seems to be well settled by the authorities. Thus, in Maryland it has been determined that the Act of 1818, giving dower in equities of redemption, has no application where the mortgage was made prior to that date.² So in Missouri, where land of the husband was sold in 1827, on a judgment rendered in 1824, and the law then in force divested dower in land sold under execution, it was held that a statute subsequently passed, and which was in force at the death of the husband, giving dower in all land of which the husband had been seized during the coverture, did not extend to the land previously sold.³ And in a case in Michigan, it was decided that a statute passed in 1846, restricting dower of non-residents to the land of which the husband died seized, did not apply where the husband and wife were residents at the date of the conveyance by the husband, although they removed from the State prior to the passage of that Act, and were non-residents at the time of the husband's death.⁴ So in Indiana, the provisions of the Revised Statutes of 1852, enlarging the right of the widow to one-third in fee, are held to have no application to land conveyed by the husband previously to the date when they took effect.⁵ The

¹ To the same effect are *Snyder v. Snyder*, 3 Barb. 621; *Holmes v. Holmes*, 4 Barb. 295; *White v. White*, 5 Barb. 474; *Hurd v. Cass*, 9 Barb 366; *Smith v. Colvin*, 17 Barb. 157; *Jackson v. Sublett*, 10 B. Mon. 467. But see *Clarke v. McCreary*, 12 Smedes & M. 347; *Lawrence v. Simmons*, 1 Dev. & B. 13.

² *Hopkins v. Frey*, 2 Gill, 359; *Mayburry v Brien*, 15 Peters, 21.

³ *Kennerly v. Misso. Ins. Co.*, 11 Misso. 204. To the same effect, *Thomas v. Hesse*, 34 Misso. 13.

⁴ *Johnston v. Vandyke*, 6 McLean, 422. But the statute of 1846 provided expressly that no right of dower which had already attached, or vested, should be affected thereby. This was construed to apply to dower inchoate as well as to dower consummate.

⁵ *Strong v. Clem*, 12 Ind. 37; *Logan v. Walton*, Ibid. 639; *Giles v. Gullion*, 13 Ind. 487; *Frantz v. Harrow*, Ibid. 507; *Strong v. Dennis*, Ibid. 514; *Galbreath v. Gray*, 20 Ind. 290.

same doctrine is well settled in Iowa.¹ So, statutes entitling the wife to demand dower in the lifetime of the husband where there has been a decree for divorce founded on his misconduct, do not apply to lands conveyed before their enactment.² But in Kentucky it has been held that a widow may demand rents as against a purchaser from her husband, from the time of filing her petition, although the land was conveyed prior to the passage of the law under which her proceeding is instituted.³

¹ *Davis v. O'Ferrall*, 4 G. Greene, 168, 358; *Young v. Wolcott*, 1 Clarke, 174; *O'Ferrall v. Simplot*, 4 Clarke, 381. But where the real property of the husband was sold under execution in 1845, when dower was regulated by the common law rule, and the husband died in 1853, when the statute in force provided that the widow should have no dower in property which had been "sold on execution or other judicial sale," it was held that the dower right should be measured by the law in force at the date of the death of the husband, and that the widow was not entitled to dower in the property so sold. *Lucas v. Sawyer*, 17 Iowa, 517. The court, in referring to the earlier decisions in that State, remarked, that the point determined in those cases was, that the right of the widow could not be *enlarged* as against a purchaser; not that it could not be *abridged*. See ante, § 12, and *Rowland v. Rowland*, 4 G. Greene, 183.

² *Given v. Marr*, 27 Maine, 212; *Curtis v. Hobart*, 41 Maine, 230; *McCafferty v. McCafferty*, 8 Blackf. 218; *Comly v. Strader*, 1 Carter, 134; s. c. 1 Smith, 75. See vol. i., ch. 31, § 6.

³ *Yancy v. Smith*, 2 Met. (Ky.) 408.

CHAPTER II.

OF THE NATURE AND QUALITIES OF DOWER AFTER THE RIGHT HAS BECOME CONSUMMATE BUT BEFORE ASSIGNMENT.

§ 1, 2. Governed by the *lex rei sitæ*.

3. Can not be affected by subsequent legislation.

4-25. The widow is not invested with a freehold estate until her dower has been assigned.

26-32. Nor is her interest subject to levy and sale on execution.

33-36. Nor is her right the subject of a valid grant or transfer at law.

37, 38. But in equity a transfer of her interest will be sustained.

39-41. And it may be reached in equity by creditors.

42. A right of dower may be lost or extinguished by an award.

43. Proceedings to redeem may be instituted by the widow before her dower has been assigned.

Governed by the lex rei sitæ.

1. UPON the consummation of the right of dower, an inquiry naturally arises in reference to the law by which it is to be ascertained and determined. The general rule is, that the *lex rei sitæ* governs. The widow has dower, not by the law of the place of the marriage, nor of the domicile, but according to the law of the place where the particular lands are situate. The laws of Louisiana do not give dower, yet if a marriage be contracted in that State, or if the husband and wife are domiciled there, and the husband die, leaving lands in Massachusetts, the widow may have dower of those lands according to the laws of Massachusetts. So, if they are domiciled in a State where dower is restricted to lands of which the husband died seized, and the husband own lands in a State where the rule of the common law prevails, the widow will be entitled to dower according to that rule, in all lands of which he was so seized during the coverture, except so far as she has relinquished her right, or is otherwise lawfully barred. The extent of the rights of the widow in the lands of her husband is determined entirely by the laws of the State where the lands are situate.¹

¹ Story, Conf. Laws, §§ 448, 454; 1 Washb. R. P. p. 151, § 9; Ilderton v. Ilderton, 2 H. Bl. 145; Duncan v. Dick, Walker, 281; Lamar v. Scott, 3 Strobb. 562; Harding v. Alden, 9 Greenl. 140. See Barnes v. Cunningham, 9 Rich. Eq. 475.

2. And although, as a general rule, a marriage valid where contracted is everywhere valid,¹ yet if the laws of a State place certain restrictions upon marriage, and make void marriages contracted contrary to the prohibitions thus imposed, whether entered into within the State or elsewhere, a marriage contracted in violation of such laws, will confer no right of dower in that State. Thus, in Massachusetts, it is provided that a marriage contracted by a party who is prohibited from marrying there, and who goes into another State and there marries, with intent to return and evade the laws of the former State, shall be void; and under this statute the marriage will be treated as null, though valid in the State where contracted.² It seems, however, that a statute of this character applies only to citizens of the State where it is in force, and who are subject to its laws.³ As a general rule, unless the statute contain express words of nullity, it will not invalidate a marriage celebrated without the jurisdiction which imposes the prohibition, though of parties residing within it, if good by the laws of the place where it is solemnized.⁴

Dower consummate can not be affected by subsequent legislation.

3. Although there is some difference of opinion relative to the power of the legislature to abridge or abolish dower while the right is inchoate,⁵ there seems to be no conflict of authority upon the point that after it has become consummate, whether there has been an assignment or not, it is so far a vested right as to be beyond legislative control. And the general rule is, that the widow may avail herself of any interest in her husband's estate conferred by the law in force at the time of his death.⁶ It has been already shown, however, that as against a purchaser from the husband, where the wife has not joined in the conveyance, her right is

¹ Vol. i., ch. viii., §§ 20-22.

² Rev. Stat. Mass. (1836,) ch. 75, § 6; 1 Washb. R. P. 171. See *Regina v. Chadwick*, 11 Q. B. 205.

³ See 1 Washb. R. P. p. 170, § 4.

⁴ See vol. i., ch. vii., § 15.

⁵ Ante, ch. i., §§ 7-20.

⁶ *Strong v. Clem*, 12 Ind. 37; *Noel v. Ewing*, 9 Ind. 37; *Hendrickson v. Hendrickson*, 7 Ind. 13; *Galbreath v. Gray*, 20 Ind. 290; *Kennerly v. Misso. Ins. Co.*, 11 Misso. 204; *Burke v. Barron*, 8 Clarke, (Iowa), 132; *Barbour v. Barbour*, 46 Maine, 9; *Adams v. Palmer*, 51 Maine, 480; *Yancy v. Smith*, 2 Met. (Ky.) 498. See *Lawrence v. Miller*, 1 Sandf. S. C. 516; s. c. 2 Comst. 245; *Johnston v. Vandyke*, 6 McLean, 422; *Lucas v. Sawyer*, 17 Iowa, 517.

governed by the law in force at the time the purchaser acquired his title.¹

The widow is not invested with a freehold estate until her dower has been assigned.

4. The situation of a dowress after the death of her husband, and before the assignment of her dower, presents an anomaly in the rules of the common law. Although her right becomes consummate by the death of her husband, yet she has no seizin in law, nor has she any right of entry, nor can she exercise any act of ownership over the lands upon which her right has attached, until the ministerial act of assigning to her a third part in severalty, has been performed. It bears but little resemblance, therefore, to the case of a person who has become entitled to a particular estate by way of remainder or springing use. And as her title to be endowed is not of an undivided third of the entirety, but of a third part in severalty, which third part can not be ascertained until an assignment, it bears no analogy to the case of coparceners or other persons becoming entitled to undivided shares. The dower interest of the widow, while in this condition, is governed by its own particular circumstances, neither borrowing nor affording any analogies. It is probably the only instance in the law in which the right to the enjoyment of an estate, although unopposed by any adverse possession, does not confer upon the person in whom it is vested, the right to reduce it into possession by entry. The entry of the wife, upon her husband's death, without an assignment, is, by the books treated as an abatement; and a dowress in under a void assignment, may be regarded as a disseizor.² Until assignment, a title of dower affords no impediment to the validity of a recovery; nor is it to be considered for any other purpose as an outstanding estate of freehold.³ And according to the strict rule of the common law, a judgment for dower will not of itself invest the widow with the freehold. An actual entry after assignment, or a delivery of seizin

¹ Ante, ch. i., § 21.

² Park, Dow. 334 *et seq.*; 1 Roper, H & W. 387; Co. Litt. 34 b. 37 a.; Litt. § 43; Perk. § 416; Dal. 100; 1 Burr. 111; 1 Washb. R. P. 251, § 2; 4 Kent, 61; 1 Hilliard, R. P. 2 ed. p. 163, § 1; p. 177, § 77.

³ Park, Dow. 334; 4 Kent, 61; 1 Washb. R. P. 252, § 2. See 4 Bro. C. C. p. 525, per Lord Loughborough.

by the sheriff, is necessary to effect this result.¹ If, after judgment, the sheriff offer to give the demandant seizin of her third part, showing in certain the parcels, although she refuse to receive it, yet she may enter at any time after, because the certainty appears. But she shall not have an *alias habere facias seisinam*.² So she may enter after seizin delivered without any return by the sheriff.³ And if the wife be in possession of the lands of which she is dowerable, as guardian in socage, she is entitled to retain the third part of the profits upon her account in allowance of her dower; but she is not permitted to endow herself of the third part of the lands or tenements, to hold as her freehold.⁴

5. According to the principles above stated, a widow, before assignment of her dower, has not such an interest as to gain a settlement, or to be irremovable from the parish, unless she be resident on the premises.⁵ But if she reside on the premises for forty days after the death of her husband, being irremovable during that period, she gains a settlement, which, however, is not communicated to a second husband.⁶ By Statute 20 Geo. III., ch. 17, § 12, if the husband died seized, receipt of the profits of the dower without assignment, is sufficient to entitle a second husband to a vote for the county.⁷

6. The reason of the law in denying any right of entry in the wife, although her *title* is consummate, is to be found in the injustice which would arise from permitting her to be her own judge of the particular lands which she should have for her dower; or, as Chief Baron Gilbert expresses it, to “carve for herself;” while, on the other hand, the law in favor of the widow, would not subject her to the inconvenience of holding an undivided part in common for her dower, where the nature of the property admitted of an endowment in severalty. To avoid both these evils, it became necessary to suspend her right of entry until the certainty of the parcels which she should hold in dower was ascertained either judicially,

¹ Hargr. Co. Litt. 37 a. n. (1), 34 b.; 1 Hilliard, R. P. 2 ed. p. 163, § 2.

² Dyer, 278 b.; Co. Litt. 34 b. n. (5).

³ Palm. 266; Hargr. Co. Litt. 37 a. n. (2); Park, Dow. 335, note; 2 Crabb, R. P. 152; 1 Washb. R. P. 253, § 2; 4 Kent, 61, note; 1 Hilliard, R. P. 164, § 6.

⁴ Perk. § 451; Park, Dow. 336. And see Co. Litt. 38 b. 39 a. 39 b.

⁵ Rex v. Northweald Basset, 2 Barn. & Cress. 724; 9 Eng. C. L. 232.

⁶ Rex v. Painswick, Burr. Sett. Cas. 783; Greenl. note, 1 Cruise's Dig. p. *168, ch. 3, § 1.

⁷ 1 Roper, H. & W. 388, note.

by the officer of the court, or by the agreement of the dowress and the terre tenant.

7. It would seem to follow, on principle, that where, from the nature of the husband's tenancy, or for other reasons, the wife is entitled to be endowed only of an undivided share, her right of entry would accrue immediately upon her husband's death. In one case, indeed, which is to be met with in the books, it was said by Roll, Justice, that "where a *feme* can not be endowed *per metas et bundas*, she may enter without assignment."¹ In practice, however, the point is otherwise considered, upon the authority, probably, of the cases which have determined that a woman who has obtained judgment for her dower, where, from the nature of the proceeding an assignment can confer no greater certainty than before, must, nevertheless, wait for an assignment before she can enter. Thus, "if a woman bring a writ of dower of six pound rent-charge, and she hath judgment to recover the third part, albeit it be certain that she shall have forty shillings, yet she can not distrain for forty shillings before the sheriff do deliver the same to her. . . . And so it is when the wife of one tenant in common demands a third part of a moiety, yet after judgment she can not enter until the sheriff deliver to her the third part, albeit the delivery of the sheriff shall reduce it to no more certainty than it was."² The reason, however, assigned by Lord Coke for these cases, is, in terms confined to women who have brought actions for their dower, and turns upon the nature of the writ; "for," he remarks, "wheresoever the writ demands land, rent, or other thing *in certain*, the demandant, after judgment may enter or distrain before any seizin delivered to him by the sheriff upon a writ of *habere facias seisinam*. But in dower, where the writ demandeth nothing in certain, there the demandant, after the judgment, can not enter or distrain until execution sued."³ Considering the inconsistency that would arise from holding the wife to be entitled to enter *before*, but not *after* judgment, the practice is probably right in treating her as having no right of entry in these cases before assignment, even if it be founded on no better reason.⁴

8. The foregoing rules of the common law have been frequently

¹ Booth v. Lambert, Sty. 276.

² Co. Litt. 34 b., citing numerous cases from the Year Books.

³ Co. Litt. 34 b. And see Perk. § 416.

⁴ Park, Dow. 338.

applied to cases arising in practice in the courts of the several States.¹

9. In *Sheafe v. O'Neil*,² proceedings were entered against the defendant as a disseizor. She plead in bar as to one undivided third part of the demanded premises, that her late husband, during their coverture, and before the seizin of the demandant, was seized in fee of the demanded premises; that she had never parted with her right of dower therein, and upon the death of her husband, entered into the undivided third part of the lands as tenant in dower, and still possessed the same. As to the other two-thirds she entered a disclaimer. But the court held that a tenant in dower was not seized of an undivided third part, and that she could not avoid a recovery unless her dower had been legally assigned.

10. In *Hildreth v. Thompson*,³ the defendant in proceedings for dower had died after judgment in favor of the dowress, but before the issue of a writ of seizin. It was decided that the proceedings of the sheriff under the writ were wholly inoperative, and conferred no right of entry upon the demandant. Parker, C. J., remarked: "It was said in the argument that the plaintiff having recovered her judgment for dower, might have entered without writ after the death of the tenant; and the proceedings of the sheriff are available in proof of her entry and seizin. One who has recovered judgment for possession of a certain parcel of land, may, as it is said in the books, enter peaceably without the aid of the sheriff; and if an action is brought against him for the entry, he may defend himself under the judgment.⁴ But it is not so where the judgment is for an uncertain portion of, or interest in, land; for in such case it

¹ In addition to the cases noticed in the text, the following may be referred to as recognizing and supporting the doctrine of the common law, that a widow has no freehold interest in the lands of her husband until her dower has been assigned: *Branson v. Yancy*, 1 Dev. Eq. 77; *Smith v. Smith*, 13 Ala. 329; *Weaver v. Crenshaw*, 6 Ala. 873; *Taylor v. McCrackin*, 2 Blackf. 260; *Sharpley v. Jones*, 5 Haring. 373; *Moore v. City N. Y.*, 4 Seld. 110; *Johnson v. Morse*, 2 N. H. 48; *Carey v. Buntain*, 4 Bibb, 217; *McClanahan v. Porter*, 10 Misso. 746; *Waller v. Mardus*, 29 Misso. 25; *Scott v. Howard*, 3 Barb. 319; *Chapman v. Armistead*, 4 Munf. 382; *Ramsay v. Dozier*, 1 Const. S. C. (Treadw.) 112; *Lamar v. Scott*, 4 Rich. L. 516; *Guthrie v. Owen*, 10 Yerger, 339; *Green v. Putnam*, 1 Barb. 500; *Spencer v. Weston*, 1 Dev. & Bat. 213; *Hoots v. Graham*, 23 Ill. 81; *Johnson v. Shields*, 32 Maine, 424. See *Medlar v. Aulenbach*, 2 Pennsylv. (Penrose & Watts,) 335; *Speight v. Meigs*, 1 Brev. 380; *Jones v. Holloper*, 10 S. & R. 326; *Lobdell v. Hayes*, 12 Gray, 236.

² *Sheafe v. O'Neil*, 9 Mass. 13.

³ *Hildreth v. Thompson*, 16 Mass. 191.

⁴ *Withers v. Harris*, *Ld. Raym.* 808.

can not be ascertained into what part of the land the demandant has a right of entry.¹ In dower *ad ostium ecclesiæ* or *ex assensu patris*, the widow may enter immediately on the death of her husband; for there is no uncertainty, the land of which she is endowed being made certain by the contract. But in this country the land of which the widow is to be endowed can only be ascertained by assignment; and she has no right of entry until assignment made. So that if the heir should bring his writ of entry against the widow, she being in possession, she could make no defence under her claim of dower, until it had been lawfully assigned."

11. The case of *Windham v. Portland*,² was an action to recover for the support of a pauper, and depended upon a question of settlement. A widow having a dower right in forty acres of land, had contracted a second marriage, and with her husband resided upon the premises for several years, making improvements and receiving the rents and profits; but dower had never been assigned. It was held that the wife had no freehold in the land so as to gain a settlement. "A widow having a right of dower," said the court, "can not lawfully enter after her husband's death, until assignment be made by the heir or other tenant of the freehold, or in a course of legal proceedings. When the assignment is made, she acquires no new freehold, but is in by her husband, her seizin being deemed in law to be a continuation of her husband's seizin. As the entry of the husband and wife is not stated to be a disseizin of the tenant of the freehold, they must be considered as holding at his will, and not as having a freehold estate in her right."

12. Where the widow received the fruits and grass growing on her husband's lands at the time of his decease, it was determined that she was liable to the heir for their full value, and could not retain one-third on account of her right of dower.³ But it has been held in England, in a late case, that the widow, before assignment, has an interest in timber cut down by the heir, and is entitled for life, to a third part of the produce.⁴

13. So a devisee may recover in ejectment against the widow without previously assigning her dower.⁵ "A distinction was con-

¹ Co. Litt. 37 b.

² *Windham v. Portland*, 4 Mass 384.

³ *Kain v. Fisher*, 2 Seld. 597. So where she received the rents and profits. *Grimes v. Wilson*, 4 Blackf. 331.

⁴ *Bishop v. Bishop*, 13 Law J. N. S. Chan. 302; 5 Jurist, 931. See post, ch. 23, §§ 19, 20.

⁵ *Evans v. Webb*, 1 Yeates, 424.

tended for by the defendant's counsel," the court remarked in deciding the case, "that though the widow could not justify her entry against the heir or devisee, yet such heir or devisee could not recover against her, when in possession as defendant in ejectment. We can see no ground whatever for the distinction. For if she could hold adverse to the heir or devisee, without an assignment of dower, she could also maintain an ejectment to recover such possession."

11. So if the widow tarry in the chief house of her husband after the expiration of her quarantine, proceedings in ejectment may be brought against her by the heir, or by any person claiming title under him. Her only remedy in such case is to proceed for an assignment of her dower.¹

15. And as dower, before assignment, is not an estate, but a mere right, it is held in Pennsylvania that the widow of an intestate tenant in common can not maintain an action of partition in the common law courts against the co-tenant of her husband.² And in New York, if her husband die seized in severalty, she can not proceed against the heir or devisee for her dower, under the Act for the partition of lands.³ It has been determined in Rhode Island, that a claimant for dower need not be made a party to proceedings for partition, even though her writ of dower be pending in the same court for the enforcement of her right. But in such case, the court will, in its discretion, suspend the appointment of commissioners to make partition until the writ of dower is terminated, in order that the partition may not be disturbed by the assignment of dower.⁴ So in New York, in an early case, it was held that a widow is not a proper party to proceedings for partition, upon the ground that her rights do not come within the purview of the statute, and that she can not be affected in any way by the judgment of the court in such a proceeding.⁵ Subsequently it was intimated that where the husband was seized as joint tenant or tenant in common, the widow,

¹ 4 Kent, 61; *Jackson v. O'Donaghy*, 7 John. 247; *McCully v. Smith*, 2 Bailey, 103; *Collins v. Warren*, 29 Misso. 236. But see post, §§ 20-24, and ch. 3, §§ 3-14. During the continuance of her quarantine, the widow may occupy the portion allotted her by law for that purpose without disturbance. Post, ch. 3.

² *Brown v. Adams*, 2 Wharton, 188.

³ *Coles v. Coles*, 15 John. 319.

⁴ *Hoxsie v. Ellis*, 4 R. I. 123.

⁵ *Bradshaw v. Callaghan*, 5 John. 80; affirmed in the Court of Errors, 8 John. 435. The law upon this subject has since been amended. See *Barbour on Parties*, 290.

as her right of dower extends only to an undivided part, is a proper party to a partition among the several joint owners. But where the husband died seized in severalty, and partition is sought by his heirs or devisees, the rule is otherwise.¹ In Illinois, if the widow remain in possession, there can be no sale or partition of the whole premises until her dower has been assigned.² In several of the States it is provided by statute that a widow whose dower is unassigned must be made a party to proceedings for partition.³

16. An outstanding right of dower, where there has been no assignment, can not be set up as a defence in an action of right brought against the person holding the fee of the land. Nor is the widow a proper party defendant to the action; and if made a party, the judgment recovered by the plaintiff can not affect her right of dower.⁴ Nor is a dowress whose dower has not been assigned, a proper party in a suit by the heirs against a third person to enforce a trust in favor of their ancestor. She must defer proceedings for her dower until after a recovery by the heirs.⁵ And in a bill against a widow and heirs to subject real estate to the payment of debts, a dower interest unclaimed and unassigned, does not defeat the right of the creditors to sell the husband's estate.⁶

17. Upon the same principle, until dower has been assigned, no right to its enjoyment vests in the second husband. Thus, where the first husband died seized of a pew, and the widow entered into a second marriage, it was determined that the second husband acquired no interest in the pew prior to her dower therein being assigned.⁷

18. As the wife can not be said to have such an interest in her husband's lands as will authorize her to make a lease, it follows that an ejectment on a joint demise by husband and wife, when the title is in the husband alone, can not be maintained.⁸ Neither can the widow of an intestate join with the heirs in bringing ejectment for the lands of the deceased.⁹ It results from what has been already

¹ *Coles v. Coles*, 15 John. 319. See *Green v. Putnam*, 1 Barb. 500; *Tanner v. Niles*, *Ibid.* 560, 564.

² *Bonham v. Badgley*, 2 Gilm. 622.

³ See post, ch. viii.

⁴ *Cavender v. Smith*, 8 Clarke, (Iowa), 360.

⁵ *Stewart v. Chadwick*, 8 Clarke, (Iowa), 463.

⁶ *Postlewait v. Howe*, 3 Clarke, (Iowa), 365.

⁷ *Bronson v. St. Peter's Church*, 7 N. Y. Leg. Obs. 361.

⁸ *Tucker v. Vance*, 2 A. K. Marsh. 458.

⁹ *Pringle v. Gaw*, 5 S. & R. 536.

said, that at common law, the widow can not maintain ejectment for her dower until it has been set off to her.¹ But by statute in New York, and in some of the other States,² the action of ejectment is substituted for the writ of dower. These provisions, however, relate only to the form or mode of proceeding, and do not alter or modify the interest of the widow, nor make her a tenant in common with the heirs.³

19. Where land of which a husband died seized, was assigned for dower to his widow, by commissioners appointed by the Probate Court, the widow and heirs assenting to the assignment when it was made, and the report of the commissioners was subsequently accepted by the Probate Court, it was held that the widow had a defeasible freehold estate in the land from the time of the assignment, which the acceptance of the Probate Court rendered absolute; and that after such assignment the widow might enter and cut and carry away the growing crops sown by the heir previously to the assignment,⁴ although such entry was made prior to the acceptance of the report.⁵ The court, referring to the rule of the common law that a widow is entitled to enter after dower assigned, and before the sheriff's return,⁶ said: "For the certainty as to what lands she should have for her dower, was apparent after it had been so set out by the sheriff. And where the like certainty appears by the assignment of the commissioners, under the authority of the Probate Court, by the assent of the heirs, as well as by her own assent, the same rule of law should apply; that is, she may enter, although the return of the commissioners should not have been made."

20. An assignment of dower, although informal, if long acquiesced in by the parties interested, will not be disturbed by the court, and will be a sufficient protection to the widow in the enjoyment of her estate.⁷

21. And although, before her dower has been set out to her, the claim of the widow is not assignable at law, it is not, nevertheless, a personal right of action, but a right to real estate; and it is not

¹ *Doe v. Nutt*, 2 Car. & P. 430; 12 Eng. C. L. 205; *Coles v. Coles*, 15 John. 319; *Bradshaw v. Callaghan*, 5 John. 80; 1 Wash. R. P. 252, § 2; 4 Kent, 62.

² See post, ch. vi.

³ *Yates v. Paddock*, 10 Wend. 528.

⁴ See post, ch. xxi., §§ 30-34; ch. xxx., §§ 15-20.

⁵ *Parker v. Parker*, 17 Pick. 236.

⁶ Ante, § 4.

⁷ *Robinson v. Miller*, 2 B. Mon. 290.

subject to a set-off for damages, nor for moneys due, nor for the receipt by her of rents and profits of the whole of the lands in which she claims dower.¹

22. In some of the States a more liberal doctrine is extended to the widow, and she is permitted to defend her possession against the heirs or those claiming under them, until her dower is assigned. This is the case in New Jersey, where by statute the widow has a right "to hold and enjoy the mansion-house of her husband, and the messuage or plantation thereto belonging until her dower be assigned."² It is held that the right thus given to the widow "is not a common law quarantine of forty days, but a freehold for life, unless sooner defeated by the act of the heir;"³ and "if she be in possession legally, her right to dower is a good bar in an action of ejectment."⁴ But the widow can not recover against the heir or devisee for the use and occupation of the land of her deceased husband merely because she is entitled to dower and it has not been assigned to her. In order to create an indebtedness in her favor, the use and occupation must be by her sufferance and permission, or at the request of the heir or devisee.⁵ It was decided in *Laird v. Wilson*,⁶ that a widow remaining on the homestead of her late husband, with their children, is entitled to the crops until dower is legally assigned; she being accountable to the children for their portion; and that a sale of part of the crop for a child's debt, does not divest the widow of her right therein. But she is not entitled to the crops growing on the plantation at the time of her husband's death.⁷

23. In Mississippi,⁸ the widow is entitled to retain full possession of the dwelling-house in which her husband most usually dwelt next before his death, together with the outhouses, offices and improvements, and the plantation thereto belonging, free from molestation or rent, until her dower shall be assigned her. A similar provision

¹ *Bogardus v. Parker*, 7 How. Pr. R. 303; s. c. 1 Liv. Law Mag. 154.

² *Nixon's Dig.* 209, § 2. But this right terminates with the assignment of dower. *Ibid.* 212, § 24.

³ *Ackerman v. Shelp*, 3 Halst. 125.

⁴ *Den v. Dodd*, 1 Halst. 367.

⁵ *Andrews v. Andrews*, 2 Green (N. J.), 141.

⁶ *Laird v. Wilson*, 1 Penning. 281.

⁷ *Budd v. Hiler*, 3 Dutch. 43. But the rule is otherwise as to crops growing on the lands assigned for dower. *Post*, ch. xxx., §§ 15-20.

⁸ *Rev. Code Missis.* (1857,) p. 470, art. 174.

is in force in Kansas,¹ in Alabama,² in Arkansas,³ in Missouri,⁴ and in Illinois.⁵ In Virginia,⁶ and in Kentucky,⁷ this right is restricted to the mansion house and curtilage; but in both these States, the law, until recently, was the same as in the States above mentioned;⁸ and neither the widow nor her tenant was bound for rent until her dower had been set off.⁹ In Florida,¹⁰ the widow may remain in possession of the dwelling-house, outhouses, offices and improvements, without charge, until her dower is assigned. And in Georgia it has been held, that she may maintain possession of the mansion-house and tenement as against the heirs or purchasers, until the assignment of her dower.¹¹ In Massachusetts,¹² when a widow is entitled to dower in lands of which her husband died seized, she may continue to occupy the same with the children, or other heirs of the deceased, or to receive one-third of the rents and profits so long as the heirs do not object, without having her dower assigned. The law is the same in Michigan,¹³ Minnesota,¹⁴ Wisconsin,¹⁵ and Oregon.¹⁶

24. In Connecticut and Vermont, the doctrine of the common law has undergone still greater modification. It is there held that a widow entitled to dower becomes, immediately on the death of her husband, tenant in common with the heirs, and remains such until her dower is set out in severalty. In neither of these States is an assignment necessary to entitle her to enter. The rule in Connecticut is thus expressed: "By our statute 'every married woman living with her husband at the time of his death, or absent from

¹ Comp. Laws Kansas (1863), p. 480, § 16.

² Clay's Dig., p. 173, § 7. The widow can defend in ejectment against her husband's alienee. *Cook v. Webb*, 18 Ala. 810. But see Ala. Code of 1852, § 1359.

³ Dig. Stat. Ark. (1858), p. 453, § 18. See *Hill v. Mitchell*, 5 Ark. 608; *Meniffee v. Meniffee*, 3 Eng. 9.

⁴ 1 Rev. Stat. Misso. (1855), p. 672, § 21.

⁵ 1 Stat. Ill. (1858), p. 155, § 27.

⁶ Code Va. (1849), p. 475, § 8.

⁷ 2 Rev. Stat. Ky. by Stanton, p. 26, § 9.

⁸ Va. Stat. 1705, 1748, 1785; 1 Va. Rev. Code 1819, c. 107, §§ 1, 2. In Kentucky the change was made by the Revised Statutes of 1852. See *Driskell v. Hanks*, 18 B. Mon. 855, 864-5.

⁹ *Renfroe v. Taylor*, 12 B. Mon. 407; *Hyzer v. Stoker*, 3 B. Mon. 117; *Driskell v. Hanks*, 18 B. Mon. 855.

¹⁰ Thompson's Dig. p. 186, § 3.

¹¹ *Rambo v. Bell*, 3 Kelly, 207.

¹³ 2 Comp. Laws Mich. 1857, p. 852, § 12.

¹⁵ Rev. Stat. Wis. 1858, p. 547, § 12.

¹² Gen. Stat. Mass. 470, § 7.

¹⁴ Stat. Minn. 1858, p. 408 § 12.

¹⁶ Stat. Oregon, 1855, p. 406, § 12.

him by his consent, or by his default, or by inevitable accident, or in case of divorce when she is the innocent party, and no part of the estate of her husband was assigned to her for her support, shall have right of dower in one-third part of the real estate of which her husband died possessed in his own right, to be to her during her natural life.¹ The practical and judicial construction of this statute, sanctioned by at least one decision of this court,² has always been, that immediately upon the death of her husband, the widow has right to the possession of one-third of the real estate whereof he died possessed, in her own right in common with the heirs, to whom she is, in no sense, a tenant as at common law;³ and that her right of entry does not depend upon the assignment of dower, which is a mere severance of the common estate."⁴ In Vermont, in the case of *Gorham v. Daniels*,⁵ the court, in discussing the same subject, employed the following language: "This (the right of dower) at common law, would give her no right of entry until after the assignment of her interest therein. But in *Grant v. Parham*,⁶ it was considered that the dowress, upon the decease of her husband, had a present vested estate which she might convey.⁷ And in Connecticut it is considered the widow is a tenant in common with the heirs; and if the law is so to be regarded here, she has a good right of entry, whether as against a stranger, or her co-tenant. And by the revised statutes,⁸ the widow has secured to her, in express terms, a concurrent right with the heirs. 'She may continue to occupy the same with them.'⁹ That is giving her the same right of occupancy with the heirs, and must of necessity extend to all cases of land of which the husband died seized. The form of expression, 'continue to occupy,' has reference, only, to the connection kept up between the title of the dowress and the husband. I should, therefore, be inclined to think, that, as dowress, she had the same right of entry which the husband had during his life."

25. In a case in New Hampshire, a guardian had dower in real

¹ Stat. 180, tit. Dower; Stat. Conn. 1854, p. 382, § 17.

² *Crocker v. Fox*, 1 Root, 323.

³ *Calder v. Bull*, 2 Root, 50.

⁴ *Stedman v. Fortune*, 5 Conn. 462.

⁵ *Gorham v. Daniels*, 23 Verm. 600. To the same effect is *Dummerston v. Newfane*, 37 Verm. 9.

⁶ *Grant v. Parham*, 15 Verm. 649.

⁷ See post, § 36.

⁸ Ch. 51, § 11.

⁹ Until her dower is set out, the widow may continue to occupy the premises with the children and family of the deceased, or she may receive one-third of the rents and profits. Gen. Stat. Verm. 1863, p. 413, § 10.

estate which descended to her daughter; she instituted no proceedings for an assignment, and the daughter remained at home in the mother's family. It was held, that as the ward was not injured by such omission, and as the interest of both parties was identical that as much income as possible should be derived from the land, the guardian should be charged with only two-thirds of the income, and should be permitted to retain the remaining third to her use in lieu of dower.¹

Until dower is assigned the interest of the widow is not subject to levy and sale on execution.

26. It is well settled that a mere right of dower before an assignment to the widow, is not such an interest or estate as can be levied upon and sold under an execution against her or a subsequent husband.²

27. In *Jackson v. Aspell*,³ the unassigned dower interest of a widow had been sold under proceedings in attachment, in satisfaction of a debt contracted by her after the death of her husband. Subsequently there was an admeasurement of dower on the application of the purchaser, by the surrogate of the proper county. On an ejectment against the purchaser by the heir, the whole proceeding was declared void. The court, after referring to the authorities establishing the doctrine that the widow has no estate in the lands of her husband until assignment of her dower, added: "The question, then, arises, whether the dower in this case has been well assigned. It was not assigned when the trustees sold, and they had nothing to sell but a right of action which was personal as regards the widow. The third section of the Act⁴ provides that if the widow shall neglect or refuse to demand her dower for forty days after the death of her husband, that then it shall be lawful for the surrogate

¹ *Mathes v. Bennett*, 1 Foster (N. H.), 204.

² *Jackson v. Aspell*, 20 John. 411; *Gooch v. Atkins*, 14 Mass. 378; *Johnson v. Morse*, 2 N. H. 48; *Shields v. Batts*, 5 J. J. Marsh. 12; *Petty v. Malier*, 15 B. Mon. 591; *Nason v. Allen*, 5 Greenl. 479; *Waller v. Mardus*, 29 Misso. 25; *Wallis v. Smith*, 2 S. & M. 220; *Torrey v. Minor*, 1 Sm. & M. Ch. 489; *Hoots v. Graham*, 23 Ill. 81; *Wallace v. Hall*, 19 Ala. 367; *Blain v. Harrison*, 11 Ill. 384; *Summers v. Babb*, 13 Ill. 483; 1 Washb. R. P. 251, § 2; 4 Kent, 61; 1 Hilliard, R. P. 2d ed., p. 164, § 7. But in Pennsylvania, *statutory* dower, before assignment, may be seized and sold on execution. *Thomas v. Simpson*, 3 Barr, 60; *Shaupe v. Shaupe*, 12 S. & R. 12.

³ *Jackson v. Aspell*, 20 John. 411.

⁴ 1 N. R. L. 60.

of the county where the land lies, upon the petition of the heirs, guardians of minor children, or other proprietors or owners, to issue an order to three disinterested freeholders of the county, to be by him appointed, to admeasure and lay off one-third of the land as the widow's dower. The defendant was not a proprietor or owner of the land within the purview of the statute; he claimed to be the owner of the right of dower only, not of the lands out of which the dower was to be assigned; and we have seen that the widow herself had no estate in the land before the assignment, and therefore the defendant could have none. The proceedings, then, before the surrogate, were *coram non judice*, for no one applied for admeasurement having a right under the statute to make such application."

28. In *Gooch v. Atkins*,¹ a creditor had levied "on the dower which the said Hannah Atkins hath in the brick dwelling-house, situate, &c., in which the said Hannah Atkins now dwells, together with all the right and privileges belonging to the dower of the said Hannah Atkins in the said estate." Ascertaining afterwards that the widow had not been endowed, the creditor directed the officer not to return the execution, and it was not returned. He then brought an action of debt on the judgment. The widow pleaded the above facts, and insisted that the levy operated as a satisfaction. But the court overruled the plea, holding that "a widow's right to have dower assigned to her in land, is not subject to be taken in execution."

29. To an action for dower, the tenant pleaded that after the death of her husband, the demandant was in the open and peaceful possession of the premises, claiming to own them in fee; that he recovered judgment against her, and caused execution to be duly and legally extended on the premises, and seizin and possession to be delivered to himself. The demandant replied that at the time of the extent of the tenant's execution, she had no interest in the premises except unassigned dower. The court decided that "the right of a widow to have dower assigned in the lands of her husband, can not be taken in execution for her debt."²

30. An execution issued on a judgment against a widow was levied (before assignment) on "five hundred acres to be taken off the most northwardly side of the widow's dower right." A sale was made, and subsequently dower assigned, and the sheriff and

¹ *Gooch v. Atkins*, 14 Mass. 378.

² *Nason v. Allen*, 5 Greenl. 479.

commissioners executed to the purchasers a deed of five hundred acres of the part assigned to the widow. It was held that the purchasers acquired no interest in the land. The court said: "There had been no assignment of dower, and her potential right to dower was not subject to execution. Her only right in possession was that of *quarantine*, and this did not extend beyond the 'plantation.'"¹ Consequently she had no right of entry on the woodland except for estovers. The legal title to the whole tract descended to the heirs and remained in them. Before assignment of dower the widow had no transferable legal interest.² Of course she could not maintain an action of ejectment for her dower before it had been assigned.³ It results that the right to dower could not, in this case, be transferred by sale under execution. Nor did the assignment by the county court after the sale help the invalidity of the sale. The assignment could not, by retroaction, make the sale valid, which, when made, was invalid."⁴

31. So where the widow had applied for dower, and obtained an order for its assignment, it was held that so long as the order remained unexecuted, the case was governed by the same general doctrine. "In regard to the creditors of Ann Minor," the court observed, "it is sufficient to remark, that even if she has herself a right of dower, yet while it remains unascertained, and until there has been an actual admeasurement by metes and bounds, it is a mere potential interest, amounting to nothing more than a chose in action, which can not be the subject of seizure and sale under an execution at law."⁵

32. In Missouri it is provided by statute that a *creditor* of the widow, or of her husband, may have her dower assigned, and thus render it amenable to process of execution.⁶ But this statute does not change the common law rule, so as to subject the interest of the widow to execution until its requirements have been complied with and the dower assigned. If the creditor levy and sell before assignment, the purchaser will not be regarded as a creditor within the meaning of the Act. "The law," said the Missouri court in

¹ *Carey v. Buntain*, 4 Bibb, 217.

² *Tucker v. Vance*, 2 A. K. Marsh. 458. See post, § 33.

³ Ante, § 18.

⁴ *Shields v. Batts*, 5 J. J. Marsh. 12.

⁵ *Torrey v. Minor*, 1 Smedes & M. Ch 489. On this subject reference may also be had to the additional cases cited, ante, note to § 26.

⁶ 1 Rev. Stat. Misso. 1855, p. 676, § 38.

determining this point, "will not suffer the widow's dower to be assigned in a way which, in many cases, may prove detrimental to her. If the dower interest is permitted to be sold under execution before it is assigned, and the purchaser shall be compelled to go to law in order to have it allotted to him, the uncertainty whether it would ever be assigned would inevitably cause a diminution of price, which would not occur if the dower was assigned before the sale took place. To sell the right of dower at public auction, and then have it assigned, the purchaser taking the risk whether it would be assigned or not, would generally cause a sacrifice of it. The creditor should have the dower actually assigned before it is sold."¹

Nor is her right the subject of a valid grant or transfer at law.

33. As a right of dower, until it is legally and duly assigned, is a right vesting in action only, the general rule is, that at law, it can not be aliened so as to enable the grantee to bring an action therefor in his own name. A widow may release her claim of dower to the terre-tenant so as to bar herself, but she can invest no other person with a legal title thereto until it has been assigned.²

34. This doctrine applies as well to a *mortgage* by the widow of her unassigned interest, as to an ordinary deed of conveyance.³ And a *lease* by her falls within the operation of the same rule. Thus, where the widow of an intestate, before the appointment of an administrator, made a lease of his lands, and the produce of the lands was afterwards attached by creditors of the lessee, it was held that the attaching officer was liable to the heir in an action of

¹ Waller v. Mardus, 29 Misso. 25. See post, § 41.

² Jackson v. Aspell, 20 John. 411; Jackson v. Vanderheyden, 17 John. 167; Leavitt v. Lamprey, 13 Pick. 382; Todd v. Beatty, Wright's (Ohio) R. 460; Hildreth v. Thompson, 16 Mass. 191; Siglar v. Van Riper, 10 Wend. 414; Ritchie v. Putnam, 13 Wend. 524; Croade v. Ingraham, 13 Pick. 33; Foster v. Gorton, 5 Pick. 185; Johnson v. Shields, 32 Maine, 424; Tucker v. Vance, 2 A. K. Marsh. 458; Strong v. Bragg, 7 Blackf. 62; Rowe v. Johnson, 19 Maine, 146; Cox v. Jagger, 2 Cow. 638; Douglass v. McCoy, 5 Ohio, 522; Miller v. Woodman, 14 Ohio, 518; Saltmarsh v. Smith, 32 Ala. 404; Lamar v. Scott, 4 Rich. L. 516; Matlock v. Lee, 9 Ind. 298; Hoots v. Graham, 23 Ill. 81; Wallace v. Hall, 19 Ala. 367; Green v. Putnam, 1 Barb. 500; Blain v. Harrison, 11 Ill. 384; Summers v. Babb, 13 Ill. 483; Elwood v. Klock, 13 Barb. 50; Scott v. Howard, 3 Barb. 319; Perk. § 599; Park, Dow. 335; 4 Kent, 61; 1 Washb. R. P. 251, § 2; 1 Hilliard, R. P. 2d ed. 164, §§ 7, 8.

³ Strong v. Bragg, 7 Blackf. 62.

trover for its value. "The lease," said the court, "was altogether void, and the tenant acquired no rights under it."¹ So a covenant in an instrument purporting to be a lease, to pay the widow a sum of money annually as rent, in consideration of her forbearing to exercise her right of dower, is a mere personal covenant, and does not run with the land so as to bind the assignee of the covenantor. Nor can such a contract have the effect of a release, which must operate presently and absolutely. And if it appear on the face of the instrument that the subject of it is a right only to have dower assigned, neither the lessee nor his assignee is estopped to deny the title of the widow to make a valid demise.² Where a widow released her dower for a consideration, and afterwards procured an assignment to be made, under which she entered and executed a lease, it was held that the assignment gave her no new right, but simply designated what she had sold. "Before the assignment of dower," the court remarked, "the widow had no possession, and could lease none; and after release she had no right and could convey none."³

35. It has been held, however, in conformity to what appears to be a reasonable view of the law, that if a widow sell her right of dower before assignment, and execute to the purchaser a power of attorney for that purpose, he may maintain a writ of dower in her name.⁴ In the case cited, the court gave their views upon this point as follows: "Before assignment, the widow's right to dower is not regarded as an article which she can convey. The writ of dower must be in her name, and can not be maintained in the name of an assignee or purchaser. There is no ground to hold that her right to dower would be forfeited by an attempt to sell and convey. The party who takes a conveyance of the right of dower would have an equitable interest,⁵ and in this case he has an express authority from the widow to prosecute the suit in her name. It could not be prosecuted in any other, and we think the suit might be carried on by the assignee in the name of the widow, though according to his contract with her, the recovery might be for his benefit." So in *Lamar v. Scott*,⁶ it was held, that although dower, before it is

¹ *Foster v. Gorton*, 5 Pick. 185.

² *Croade v. Ingraham*, 13 Pick. 33; *Hildreth v. Thompson*, 16 Mass. 191; *Blain v. Harrison*, 11 Ill. 384.

³ *Matlock v. Lee*, 9 Ind. 298.

⁴ *Robie v. Flanders*, 33 N. H. 524.

⁵ *Post*, § 37.

⁶ *Lamar v. Scott*, 4 Rich. L. 516.

assigned and set apart to the widow, is not an estate or interest in land which can be assigned or sold, so as to vest the legal title in the assignee or alienee, and so enable him to sue therefor in his own name, yet the court will take notice of and protect the rights of such assignee, and sustain an action for his benefit in the name of the widow. Similar rulings have been made in Pennsylvania and in Maine.¹ And where the purchaser of a widow's unassigned right of dower, entered into possession and had dower admeasured to him, the widow making no objection, it was held that he could not be permitted to set aside the release on the ground that it was executed before the dower was assigned. The utmost he could claim in such a case would be to have his title perfected.² Where there were two rights of dower in the same land, and the widow having the elder right, brought suit and recovered judgment against the tenant, and then released to him before entry, it was held that he might set up the interest so acquired against the widow having the junior right, and restrict her to dower in two-thirds of the estate.³ But a release before judgment is held to operate as an *extinguishment* of the right, and the tenant can not avail himself of it against the junior claim.⁴

36. We have seen that in Connecticut and Vermont, the widow, upon the death of her husband, is regarded as a tenant in common with the heirs, and may enter without waiting for an assignment.⁵ It follows that in these States a formal admeasurement of dower is not essential to the validity of a conveyance of her interest. "In any view of the subject," said the Vermont court, "whether she is considered as having only a right of action, or a vested interest, she may bar herself of her right of dower in any particular lot, by deed executed after the death of her husband." And the court added: "Moreover, by the deed which she executed to Brown, she covenants with him, his heirs and assigns, that from and after the executing the deed, she would have and claim no right in or to the remised, released, and quit-claimed premises. By the deed and

¹ Thomas v. Simpson, 3 Barr, 60, 71; Rowe v. Johnson, 19 Maine, 146. See, also, Powell v. Powell, 10 Ala. 900; Hunt v. Acre, 28 Ala. 580; Buffington v. Smith, 2 Brevard, 98; 1 Washb. R. P. 251, § 2.

² Todd v. Beatty, Wright's (Ohio) R. 460. But see Miller v. Woodman, 14 Ohio, 518; Blain v. Harrison, 11 Ill 384.

³ Leavitt v. Lamprey, 13 Pick. 382.

⁴ Elwood v. Klock, 13 Barb. 50. See vol. i., ch. xv., § 21.

⁵ Ante, § 24.

the covenant therein, she is estopped from setting up any claim of dower in the premises thus conveyed."¹

In equity a transfer of the widow's interest will be sustained.

37. While courts of equity fully recognize the rule that at law, the widow's right of dower, previous to an assignment, is not such an interest as can be made the subject of a conveyance to a stranger by any of the ordinary modes of conveying freehold estates, so as to vest the legal interest in the grantee,² yet in those courts, if the widow be entitled to an immediate assignment of dower, the want of a mere formal assignment is not considered material,³ and her contract concerning her interest may be of such character that it will be enforced. Thus in *Potter v. Everitt*,⁴ the widow conveyed by regular deed her dower interest in her husband's lands to one of the heirs. The heir brought his bill against the widow and the other heirs to have the dower assigned to him, and the court decreed in his favor. "Before the assignment of her dower," said Nash, J., "a widow is not seized of any portion of the real estate of her husband, and can not, therefore, convey any title at law to it. She can, however, make such a contract concerning it as equity can, and will, under proper circumstances, enforce. The bill, substantially, is to compel the heirs to allot the dower; and then that the widow shall convey the land so allotted. . . . The plaintiff is entitled to a decree for the allotment of the dower land, and thereafter to an assignment thereof from the defendant, Mrs. Potter." In a case in South Carolina, the following rule was laid down by the court: "In the court of equity, the assignee of a right of dower may state the assignment and sue in his own name as assignee; but the right to be perfected is still the assignor's right; and being a legal, and not an equitable one, is subject to all the incidents which would at law attach to it."⁵ So it has been held in Maryland, that where the widow has assigned her claim, her assignee,

¹ *Grant v. Parham*, 15 Verm. 649.

² *Tompkins v. Fonda*, 4 Paige, 448; *Potter v. Everitt*, 7 Ired. Eq. 152; *Torrey v. Minor*, 1 S. & M. Ch. 489; *Strong v. Clem*, 12 Ind. 37; 1 Washb. R. P. 251, § 2.

³ Per Walworth, Chancellor, in *Tompkins v. Fonda*, 4 Paige, 448; 1 Washb. R. P. 251, § 2; 4 Kent, 61, note; 1 Hilliard, R. P. 2d ed. 165, § 11.

⁴ *Potter v. Everitt*, 7 Ired. Eq. 152.

⁵ *Wilson v. McLenaghan*, 1 McMullan's Eq. 35.

in equity, succeeds to her rights.¹ In Indiana, in a recent case, the subject underwent a full discussion, and it was held, not only that the interest of the dowress is transferable in equity, but that an assignment may be enforced, under the code of practice adopted in that State, in the name of the purchaser.² The reasoning of the court was as follows: "The first question arising in this case, is whether a dower interest accruing to the widow, in the real estate of her deceased husband, by virtue of the marriage, is assignable; and we think it is. Upon the death of the husband, the previous inchoate right of the wife becomes consummate—a vested right, lying, it is true, in action, but still vested. It is a right, a chose in action, arising, not out of tort, but contract. Such rights of action, and such interests were assignable in equity, at common law, so as to enable the assignee to recover upon them in a suit in his own name in chancery, but not at law. The assignment transferred the equitable, not the legal title." After referring to the authorities showing that transfers of choses in action are supported in equity, the court proceeded: "This right of the widow, then, being equitably assignable, may be enforced under our present code in the name of the assignee. For, while our statute may not have enlarged the common law right as to equitable assignments, it has invested the equitable assignee with the right to sue in his own name as he might formerly do in chancery. *Strong v. Bragg*,³ can not be reconciled with the view we have taken; but that case, rightly decided as one at law, was wrongly decided as a case in chancery."⁴ The doctrine of these cases, recognizing the power of a court of equity to enforce the contract of a widow for the sale of her dower interest, when fairly made, and to protect the assignee in his rights, seems both reasonable and just, and is undoubtedly supported by the weight of authority. A case or two may be found, however, in which a contrary view is maintained.⁵

38. But an assignment by the husband of "all and singular the

¹ *Maccubbin v. Cromwell*, 2 Har. & G. 443.

² *Strong v. Clem*, 12 Ind. 37.

³ *Strong v. Bragg*, 7 Blackf. 62; ante, § 34.

⁴ See, also, *Robie v. Flanders*, 33 N. H. 524, where it is said that "the party who takes a conveyance of the right of dower would have an equitable interest"; *Todd v. Beatty*, Wright's (Ohio) R. 460; *Powell v. Powell*, 10 Ala. 900; *Lamar v. Scott*, 4 Rich. L. 516; *Waller v. Mardus*, 29 Misso. 25; *Hamilton v. Mohun*, 1 P. Wms. 122; *Brown v. Meredith*, 2 Keen, 527; 15 Eng. Ch. R.

⁵ *Saltmarsh v. Smith*, 32 Ala. 404; *Blain v. Harrison*, 11 Ill. 384.

legacies, debts, moneys, estate and effects whatsoever and where-soever, and of what nature or kind soever, of, or to which the said (husband) in right of his wife, or otherwise, was possessed, as well under the will and codicil of Robert Newby, as in any other manner howsoever," will not, even in equity, pass a right of dower to which the wife is entitled as the widow of a former husband.¹ "Until the lands to be held in dower," said the Master of the Rolls, "are assigned, the widow has no estate in the lands of her deceased husband. She has a right to have her dower assigned, but has no estate in the lands; and her after-taken husband, claiming only in her right, has no estate in the lands. And supposing the widow's right to dower to be an interest which her after-taken husband could assign in equity, I think that by the deed of the 15th of March, 1834, as stated in this bill, Mr. Hall has not assigned his wife's claims to dower to the plaintiffs. . . . There is no recital referring to Mrs. Hall's claim for dower, nor are there any words aptly or sufficiently describing it; and without saying that the right of Mrs. Hall might not, by proper means, have been effectually assigned in equity, I think that by this deed, describing the property to be assigned in the manner I have mentioned, Mrs. Hall's right to dower, if existing, did not pass."

The interest of the widow before assignment may be reached in equity by creditors.

39. As a result of the doctrine of the equity courts above discussed, it is held that a right of dower, before assignment, may be reached by a creditor's bill, and subjected to the payment of debts.²

40. In *Tompkins v. Fonda*,³ in which this subject was thoroughly considered by Chancellor Walworth, there was an application for the appointment of a receiver upon a judgment creditor's bill. The only property of the demandant was her right of dower in a farm of which her husband had died seized; of which farm she had con-

¹ *Brown v. Meredith*, 2 Keen, 527; 15 Eng. Ch. R.

² *Tompkins v. Fonda*, 4 Paige, 448; *Stewart v. McMartin*, 5 Barb. 438; 4 Kent, 61; 1 Hilliard, R. P. 2d ed. p. 165, § 15. In Missouri, it is provided by statute that a creditor of the widow, or of her husband, may have her dower assigned. 1 Rev. Stat. Misso. 1855, p. 676, § 38. See ante, § 32, and post, § 41.

³ *Tompkins v. Fonda*, *supra*.

tinued in possession with the heirs of her husband from the time of his death; but her dower therein had never been demanded nor assigned to her. And the only question presented for decision, was whether this was such an interest as could be reached by the aid of a court of chancery, after the return of an execution at law unsatisfied. The chancellor, after referring to the rule at law, said: "But in equity, if the widow is in possession, or is entitled to an assignment of dower immediately, the want of a mere formal assignment of dower is not considered material. And if she has received the income of the whole premises, either as guardian of the heirs at law, or otherwise, she will, upon the taking of an account thereof, be entitled to retain her third, although her dower has not been assigned.¹ She has no right, therefore, in conscience or in equity, to deprive her creditors of the benefit of her right of dower, for the satisfaction of their debts, by continuing in possession with the heirs, and neglecting to ask for a formal assignment, which assignment and entry under it, would enable the creditors to reach it by execution. The right of dower of the defendant in this case is such an interest as may be reached by the aid of this court, and applied to the satisfaction of complainant's judgment. Indeed, the term 'things in action,' as used in the statute,² embraces this very case, as the widow's right of dower, before assignment, is not an estate in her, but is properly a chose in action.³ Although the legal title to a mere chose in action can not be assigned so as to authorize the assignee to maintain an action at law in his own name, yet in equity such assignments are sustained. And even courts of law now recognize the validity of such assignments, so far as to protect the interest of the assignees against a release or discharge of the right of action by the assignor. It must, therefore, be referred to a master in the county of Saratoga, to appoint a receiver, and to take from such receiver and file with the register a bond with sufficient sureties, conditional for the faithful performance of his trust. And after the appointment of such receiver, the defendant must assign to him, for the purpose of this suit, her right of dower in the farm. The receiver is also to be authorized to proceed in her name for the recovery and assignment of her dower and the arrears thereof which

¹ 1 P. Wms. 122. See, also, *Evertson v. Tappen*, 5 John. Ch. 497; vol. i., ch. xxiv., § 35; *Mathes v. Bennett*, 1 Foster (N. H.), 204; ante, § 25.

² 2 R. S. 174, § 39.

³ Jacob's Law Dict., title Chose; *Termes De La Ley*, Chose in Action.

may be due. And after such dower has been assigned, the receiver is to be let into the possession of the lands so assigned to the defendant for her dower, and to receive the rents and profits thereof until the further order of this court." This ruling was followed, and a similar decree entered in *Stewart v. McMartin*,¹ decided in the Supreme Court of the same State.

41. But under the Missouri statute before referred to,² enabling a creditor to compel an assignment of dower, the rule in equity is the same as at law, and a purchaser under execution can not avail himself of its provisions where the levy and sale were anterior to any admeasurement of dower to the widow. In a case in which this point was considered, the court said: "Whether she (the widow) could, by a voluntary assignment of this chose in action, enable her assignee to sue in equity to have the dower assigned, is not a question involved in this case. . . . The plaintiffs, who were purchasers at the sheriff's sale, can not be regarded as assignees of the interest, and entitled, therefore, to go into equity to have the dower assigned to them. . . . Although the plaintiffs may have given its value for the dower interest in this case, yet as our experience teaches us that such a mode of disposing of dower must produce sacrifices, the rule must be uniform, and it can not be made to depend upon the amount realized by the sale. The purchasers can not be regarded as creditors and be substituted in the place of the plaintiffs in the execution, as the right of substitution, which is founded on equitable principles, can not be claimed when its allowance would contravene the policy of the law."³

A right of dower may be lost or extinguished by an award.

42. As a right of dower, before assignment, is regarded as a mere chose in action, an award, founded upon a submission duly made by the demandant and the parties having the inheritance, will be binding upon them. Thus, in *Cox v. Jagger*,⁴ the widow agreed with the heir to release her dower to the tenants in pos-

¹ *Stewart v. McMartin*, 5 Barb. 438.

² Ante, § 32.

³ *Waller v. Mardus*, 29 Misso. 25. See ante, § 32.

⁴ *Cox v. Jagger*, 2 Cow. 638. A statute in Oregon provides that there shall be no submission to arbitrators respecting the claim of any person to an estate for life in lands; but that controversies concerning the *admeasurement* of dower may be submitted. Stat. Oregon, 1855, p. 176, § 2.

session, (they having become purchasers in the lifetime of the husband), but there was a disagreement as to the amount to be paid her. The matter in controversy was submitted to arbitrators, who made their award. Afterwards the widow brought suit for dower, claiming that a right of dower is the subject of a real, and not of a personal action, and therefore that the submission and award were invalid. But the court held that she was barred by the award from asserting any claim to the land.¹ In *Furber v. Chamberlain*,² the widow recovered judgment of dower against the tenant in possession; and subsequently her agent entered into a submission with the grantor and warrantor of the tenant, by which it was referred to arbitrators to determine what sum annually should be paid to the widow by the grantor, instead of dower being assigned to her. An award was made fixing the sum, and a bond given by the grantor to pay the same, but after several payments he became insolvent, and neglected to pay further. The widow had not discharged the judgment, nor signed any release of her dower. It was held that she was bound by the award so long as payments were made, but on failure of payment she might institute proceedings to obtain possession of the land; that the true meaning of the submission was, that the annual payments should be received, not in lieu and discharge of her dower in the land, but in the nature of rent for its use.

Proceedings to redeem may be instituted by the widow before her dower has been assigned.

43. It has been elsewhere shown, that where lands are subject to an incumbrance valid against the widow, she must, as against the mortgagee, or those claiming under him, redeem the lands before she can claim her dower.³ It follows, as a necessary result of this principle, that she may institute proceedings to redeem before her dower has been assigned.⁴

¹ To the same effect is *Shotwell v. Sedam*, 3 Ohio, 5.

² *Furber v. Chamberlain*, 9 Foster (N. H.), 405.

³ Vol. i., ch. xxiii., § 22.

⁴ *Ibid.* See post, ch. vii., §§ 26-31; 1 Hilliard, R. P. 2d ed. p. 165, § 17.

CHAPTER III.

QUARANTINE.

§ 1, 2. Quarantine at common law.	18. Right of quarantine not subject to execution.
3-14. Quarantine in the United States.	19, 20. Remedy of the widow where she has been deforced of her quarantine.
15-17. Forfeiture of quarantine.	21-23. Termination of quarantine.

Quarantine at Common Law.

1. According to Lord Coke the laws of England, before the Conquest, secured to the widow the right to continue an entire year in her husband's house, within which time her dower was to be assigned.¹ It is worthy of observation, however, that the Charter of Henry I., granted in 1101, and about thirty-five years, only, subsequent to the Conquest, although recognizing the right of dower, contains no provision for the widow's quarantine;² nor does Glanville, whose work was written in the reign of Henry II.,³ make any allusion to it. But the mode of endowment in common use in the time of that writer, was *ad ostium ecclesiæ*; and where the widow was thus endowed of specific lands, no further assignment was necessary, and it was her privilege, if the lands assigned her were vacant at the death of her husband, to enter at once upon the enjoyment of her estate.⁴ The Great Charter of King John,⁵ however, contains an express provision that the widow "may remain in her husband's house forty days after his death, within which

¹ Co. Litt. 32 b.

² Bl. Intr. to the Great Charters, Law Tracts, 286, note d.; Thomson's Charters, 403; vol. i., ch. i., § 12.

³ Vol. i., ch. i., § 14.

⁴ Glanv. lib. 6, ch. 1 and 4; vol. i., ch. i., §§ 14, 20, 24. Glanville details with particularity the remedy provided for the widow where any part of the dower lands was occupied at the death of the husband, or where in consequence of the endowment having been of the husband's lands generally, it became necessary to demand an assignment. Glanv. lib. 6, ch. 4, *et seq.*

⁵ A. D. 1215.

time her dower shall be assigned.”¹ The privilege thus conferred upon the widow is called her *quarantine*.² In the first Charter of Henry III.,³ the following clause is added to the foregoing provision of the Charter of King John: “Unless it shall have been assigned before, or excepting his house shall be a castle;⁴ and if she departs from the castle, there shall be provided for her a complete house in which she may decently dwell until her dower shall be assigned to her as aforesaid.”⁵ In the second Charter of Henry III.,⁶ it is further provided that “she shall have her reasonable estover within a common term.”⁷ It appears to have been determined that “the day upon which the husband died was to be accounted the first day, thus practically restricting the widow to thirty-nine days.”⁸ Mr. Barrington remarks that “one of the reasons for the widow continuing forty days within the capital messuage, was to prevent a supposititious child, which deceit was not uncommonly practiced in those times, as may be inferred from the old writ *De ventre inspi-ciendo*.”⁹ But probably the true reason is to be found in a tender regard for her condition; for it would seem barbarous in the extreme to compel the widow to leave the home in which she had

¹ King John's *Magna Carta*, ch. 7; Bl. Charters, xiii.; Thomson's Charters, 68; vol. i., ch. 1, § 15.

² Co. Litt. 32 b., 34 b.; 2 Inst. 16, 17. Lord Coke cites as his authority for the statement that before the Conquest the widow was entitled to remain a whole year in her husband's house, “Lamb. Sect. 120, 71, and divers ancient manuscripts.” Co. Litt. 32 b. Beames, in his edition of Glanville, quotes the following passage from the laws of Canute, as evidence of the favor extended to the widow at that early day: “*Ubi maritus habitavit absque lite et absque controversia, habitent uxor et infans ubique absque lite*. LL. Canuti, 70, Ed. Wilkins.” Beames' Glanv. p. 131, note. The “Ancient Laws and Institutes of England” contain the original Saxon version of the law here referred to, and the following translation: “And where the husband dwelt without claim or contest, let the wife and the children dwell in the same, unassailed by litigation.” 1 Anc. Laws and Inst. of Eng., p. 415, pl. 73. By another law of Canute, if the widow married within the period of twelve months after the death of her husband, she forfeited all the goods and lands received from her first husband. Ibid. p. 417, pl. 74; vol. i., ch. i., §§ 8, 19.

³ A. D. 1216.

⁴ “This is intended of a castle that is warlike, and maintained for the necessary defence of the realm, and not for a castle in name maintained for habitation of the owner.” 2 Inst. 17; vol. i., ch. 27, § 1.

⁵ Thomson's Charters, 108, 109; Black. Charters, xxviii., c. 7; vol. i., ch. 1, § 16.

⁶ A. D. 1217.

⁷ Black. Chart. xxxv.; Thomson's Charters, 118, 121; vol. i., ch. 1, § 17; Park, Dow. 250.

⁸ Dyer, fol. 76 b., 7 E. VI.; 2 Inst. 17.

⁹ Barrington, Obs. Anc. Stat. 10.

been accustomed to dwell, immediately upon the death of her husband, and before any opportunity had been afforded her to make provision for her future sustenance and support.¹

2. It is a controverted question in the old books, whether, at common law, the widow was entitled to be supported from her husband's estate during the period of her quarantine. Lord Coke maintains that the term "estover" occurring in the second Charter of Henry III., is to be taken in its enlarged sense, and as entitling the widow to maintenance during that time. "So as *estoverium* here," he says, "is taken for sustenance. . . . This word *estoverium* cometh of the French verb, *estover*, *id est*, *alere*, to sustain or nourish, and this agreeth with the said old books; and in this sense it is taken in the Statute of Gloucester. *Trover estovers in viver and vesture*, that is, things that concern the nourishment or maintenance of man *in victu and vestitu*, wherein is contained, meat, drink, garments and habitation. . . . When estovers are restrained to woods, it signifieth house-bote, hedge-bote and plough-bote."² And this view appears to have been generally adopted and acted upon in practice.³ But in a marginal note by Newton to Fitzherbert's *Natura Brevium*, this proposition is denied in these terms: "The woman shall not have meat and drink; for the statute doth not extend to it. But Fitzherbert in abridging the case, queries if she may kill anything for her provision, if there be not any provision in the house."⁴

Quarantine in the United States.

3. The quarantine of the widow was not overlooked in the early legislation of this country,⁵ and later enactments have, in many instances, materially enlarged this important right.⁶

¹ Speaking of the form of the writ given by Glanville for the assignment of dower, directing that the dower lands should have a message upon them, (Glanv. book 12, ch. 20), Mr. Beames says: "It was certainly a qualification of the severity of the rule which would turn the widow out of that house she might possibly long have occupied with her husband as its mistress." Beames' Glanv. p. 131, note.

² 2 Inst. 17.

³ Jenk. Cent. 284, pl. 16; 9 Vin. Abr. 272, title Dower, (I. a.) pl. 2, 3, 4; Doe d. Groves v. Groves, 16 Law Jour. N. S. 279; Park, Dow. 250, note; 1 Roper, H. & W. 388; 1 Bright, H. & W. 363, pl. 4.

⁴ Fitzh. N. B. 162, in margin.

⁵ See references to early statutes on the subject of dower and quarantine, in vol. i., ch. ii.

⁶ See ante, ch. ii., §§ 22-25.

4. In Virginia,¹ until dower is assigned, the widow is entitled to occupy and enjoy the mansion-house and curtilage without charge. So in Kentucky,² and in Florida.³ In several of the States, as we have seen,⁴ the widow is authorized to retain possession of the entire plantation with its improvements until her dower has been set off to her.⁵ The rule is the same in Rhode Island, except that she is required to bring her writ of dower within twelve months after probate of the will or the grant of letters of administration.⁶ And in several of the States in which this privilege is given her, the widow is permitted to occupy a portion of the premises for a specified time, even though her dower is assigned before the expiration of that time. Thus, in Arkansas,⁷ she may tarry in the mansion or chief dwelling-house of her husband for two months after his death, and in the meantime is entitled to her reasonable sustenance out of his estate. In Massachusetts,⁸ Michigan,⁹ Wisconsin,¹⁰ Minnesota,¹¹ and Oregon,¹² where the husband dies seized, the widow may continue to occupy the premises with his heirs, or receive one-third of the rents and profits, so long as they do not object.¹³ And in Massachusetts,¹⁴ the widow is entitled to remain

¹ Code Va. 1849, p. 475, § 8. The Virginia statute of 1664 contains no allusion to quarantine. See vol. i., ch. ii., § 4. The Act of 1673 is also silent upon that subject. Ibid. The Act of 1705 allowed the widow to continue in the mansion-house and messuage or plantation thereto belonging, free of charge, until her dower was assigned. 3 Hen. Stat. 374, § 8. Re-enacted in 1748. 5 Hen. Stat. p. 448, § 14; and in 1785. 12 Hen. Stat. p. 162, § 1. See, also, 1 Rev. Code, 1819, p. 403, § 2.

² 2 Rev. St. Ky. by Stanton, p. 26, § 9. Prior to the revised statutes of 1852, the widow was permitted to retain possession of the entire plantation until the assignment of her dower. 1 Ky. Rev. Laws, 573; *Chaplin v. Simmons*, 7 Mon. 337; *Hyzer v. Stoker*, 3 B. Mon. 117; *Renfroe v. Taylor*, 12 B. Mon. 407; *Driskell v. Hanks*, 18 B. Mon. 855. See post, § 6.

³ Thompson's Dig. p. 186, § 3.

⁴ Ante, ch. ii., §§ 22-25.

⁵ Rev. Code Missis. 1857, p. 470, art. 174; Comp. Laws Kansas, 1862, p. 480, § 16; Clay's Dig. Ala. Stat. p. 173, § 7; Dig. Stat. Ark. 1858, p. 453, § 18; Nixon's Dig. Stat. N. J. p. 209, § 2; p. 212, § 24; 1 Rev. Stat. Misso. 1855, p. 672, § 21; 1 Stat. Ill. 1858, p. 155, § 27. In Alabama it has been decided that the right to occupy the dwelling-house, given by statute, (Code 1852, § 1359), is not in lieu of dower for the time being, but is an extension of the quarantine. *Perrine v. Perrine*, 35 Ala. 644.

⁶ Rev. Stat. R. I. 1857, p. 504, § 6.

⁷ Dig. Stat. Ark. 1858, p. 453, § 17.

⁸ Gen. Stat. Mass. p. 470, § 7.

⁹ 2 Comp. Laws Mich. 1857, p. 852, § 12.

¹⁰ Rev. Stat. Wis. 1858, p. 547, § 12.

¹¹ Stat. Minn. 1858, p. 408, § 12.

¹² Stat. Oregon, 1855, p. 406, § 12.

¹³ See ch. ii., §§ 22-25.

¹⁴ Gen. Stat. Mass. p. 471, § 18.

in the dwelling house of her husband forty days without being chargeable with rent. In Michigan,¹ Wisconsin,² Minnesota,³ and Oregon,⁴ she may remain in the dwelling-house one year, and is entitled to her reasonable sustenance out of the estate for the same length of time. In New York,⁵ the widow may tarry in the chief house of her husband, and is entitled to reasonable sustenance out of his estate for forty days after his death. In Maine,⁶ the period of the quarantine is fixed at ninety days. In Ohio,⁷ at one year. In Indiana,⁸ it is provided that the surviving wife and minor children shall, in all cases, be allowed to remain in the ordinary dwelling-house of the family, and to occupy the same, and the messuage thereto appertaining, and fields adjacent, if any, not to exceed forty acres, free of rent for one year from the death of the husband. In Vermont,⁹ and Connecticut,¹⁰ the widow may continue to occupy the estate with the children and family of the deceased until her dower is set out.¹¹

5. The privilege of quarantine extends only to such property as the widow is dowable of. It does not apply to leasehold estates, except in those States where interests of that description are made subject to dower.¹² And it has been held that quarantine can not be claimed of property held in common. In *Collins v. Warren*,¹³ where this point was fully discussed, the court said: "This deed makes them tenants in common of the lot in controversy, and on the death of Warren, his widow would be entitled to dower in his interest in the lot; and this being a suit to eject her from the possession of the entire lot, she relies on the dower law in the code of 1845, and defends herself under the 16th section thereof, which enacts that until dower be assigned, the widow may remain in and enjoy the mansion-house of her husband, and the messuage or plantation thereto belonging, without being liable to pay any

¹ 2 Comp. Laws Mich. 1857, p. 854, § 23.

² Wis. Rev. Stat. 1858, p. 548, § 23. ³ Stat. Minn. 1858, p. 409, § 23.

⁴ Stat. Oregon, 1855, p. 408, § 23.

⁵ 1 Rev. Stat. N. Y. p. 742, § 17. A dwelling-house is an entire thing. It includes the building and such attachments as are usually occupied by the family for the ordinary purposes of the house. *Chase v. Hamilton Ins. Co.*, 20 N. Y. 52.

⁶ Rev. Stat. Maine, 1857, p. 606, § 16.

⁷ 1 Swan & Critchf. Rev. Stat. Ohio, p. 518, § 1.

⁸ 1 Rev. Stat. Ind. 1852, p. 253, § 28.

⁹ Gen. Stat. Verm. 1863, p. 413, § 10.

¹⁰ Stat. Conn. 1854, p. 382, § 17.

¹¹ See ch. ii., § 24.

¹² *Voelckner v. Hudson*, 1 Sand. S. C. Rep. 215. See vol. i, ch. xvii., §§ 12-18.

¹³ *Collins v. Warren*, 29 Misso. 236.

rent for the same.¹ Now, although under this statute, a widow may sue to recover her quarantine when ejected, or may defend herself under it against an action of ejectment by the heir, or those claiming under him, yet under the case as stated, we do not consider the section referred to furnishes her any defence to this action. Two are tenants in common of a house and lot; one of the tenants, who is in possession, dies; can such widow, under the above cited section, hold the possession of the entire house and lot, to the exclusion of the surviving tenant? Could the legislature have intended that the section should apply in such a case, and the widow be entitled to retain the entire house and lot, excluding the co-tenant, and depriving him of all rent for his property? Now, whether the widow's right be a third, a half, or a child's part, on what principle can the law give her a right to remain in the entire mansion-house at the expense of a co-tenant who has as great if not a greater interest in it than she has? It may be competent for the legislature to do such an act by laws operating prospectively, but respect for that department of the government, would prevent us from holding the opinion that any such thing was ever contemplated. The law was only designed for the cases where the husband died the sole owner of the mansion-house. It must be his and his exclusively. It was never intended that the widow should have her quarantine at the expense of those who are in no ways connected with her. This, then, being a case in which the widow can not have any quarantine, she stands as she would at common law when the quarantine had expired. She would be ejected by the heir and made to pay damages." As the plaintiff, however, was entitled to an undivided moiety, only, his recovery was limited accordingly.

6. So, in Illinois, it has been held that unimproved lands situate some three miles distant from the farm occupied by the husband at his death, are not subject to quarantine.² But it is clearly the right of the widow to retain the exclusive possession of the farm on which the dwelling-house is situated, until the assignment of her dower. And it has been suggested, that perhaps she may lease the same, and receive the rent to her own use so long as her dower remains unassigned. The possession of the tenant, in such case, it was remarked, might be regarded as her possession within

¹ Rev. Code Misso. 1845, p. 432, § 16.

² *Hoots v. Graham*, 23 Ill. 81.

the true intent of the statute.¹ In Alabama, in a case where the husband resided in a town exercising the calling of a hotel keeper, it was determined that his widow had no right of quarantine in a plantation owned by him situate several miles distant from his residence.² Her right is limited to the dwelling-house, outhouses, &c., until her dower is assigned.³ In North Carolina, the right of quarantine does not extend beyond the land on which the husband has his chief house.⁴ But in Kentucky, where formerly the quarantine embraced the mansion-house and plantation,⁵ it was held that a town lot, including the mansion-house, should go to her as a plantation would in the country.⁶ And she was held entitled to the whole plantation, not merely that part of it which was enclosed. Although not authorized to extend the enclosures, yet where the unenclosed portions consisted of the wood and timber land, and constituted a part of the plantation, she had a right to make reasonable use of the timber growing thereon, for fuel and necessary repairs.⁷ But in other respects she could only enjoy the plantation as it was at the death of her husband, and not as it was enlarged or extended by clearing done subsequently thereto.⁸

7. In Indiana, it has been held, that the term "messuage," as used in the statute regulating dower prior to the revision of 1852, may include a few acres of land adjacent to a dwelling-house, but not a whole farm.⁹ "It is difficult," said the court, "to define with precision the signification of the legal term *messuage*. Authors have differed in their understanding of its import. The best writers, however, represent it as synonymous with *house*, and as embracing within its meaning an orchard, garden, curtilage, adjoining buildings, and other appendages of a dwelling-house; but they limit the ground which may be appropriated to these purposes, to a small quantity, not exceeding an 'acre or more.'"¹⁰

8. In Missouri, a widow electing to take a child's share under

¹ Clark v. Brownside, 15 Ill. 62, 63. Upon this point, see Renfroe v. Taylor, 12 B. Mon. 407.

² Smith v. Smith, 13 Ala. 329.

³ Weaver v. Crenshaw, 6 Ala. 873.

⁴ Spencer v. Weston, 1 Dev. & Bat. 213.

⁵ Ante, § 4, note.

⁶ Stewart v. Stewart, 3 J. J. Marsh. 48.

⁷ Roberts v. Commonwealth, 11 B. Mon. 4. But see Carey v. Buntain, 4 Bibb, 217.

⁸ White v. Clarke, 7 Mon. 640.

⁹ Grimes v. Wilson, 4 Blackf. 331. See ante, § 4.

¹⁰ 1 Thom. Coke, 215, 216, and notes; 1 Shep. Touch. 94; 2 Saund. 401, note 2.

the statute,¹ is considered as a dowress, and is entitled to her quarantine until her share of the estate is properly assigned to her. If the rents of the mansion-house of the deceased, or of the plantation thereto belonging, be collected by the administrator, she is entitled to demand the same up to the date of the assignment of dower. And she is entitled to her quarantine of the whole of the farm or plantation upon which the mansion-house of the deceased was situated. If part of the same has been rented by the husband to a tenant, she is entitled to a share of the rents of the estate until the expiration of the tenant's term; from that time she is entitled to the whole rent until dower is assigned.² "Our own statute," the court observed in the case cited, after referring to decisions in other States relative to this subject, "extending the widow's quarantine to the mansion-house and messuages, or plantation, may be well understood to mean that when the mansion-house was on the plantation, she should have the whole plantation, without restriction to the messuage, but where there is only a messuage attached to the mansion-house, she should have only that. This appears to be the more reasonable when it is considered that so large a portion of the population of the State live upon and derive their support from plantations, or farms, as they are more commonly called, which are generally small; and that, upon the death of the husband, the possession of the whole farm by the widow may be very often of great importance for the present support and comfort, not only of the widow herself, but also of the family, of which, by the death of her husband, she has become the head. And it is improbable that any great injury can happen to any other person by this construction of the statute, for any person having an interest in the land, or a creditor of the widow, may apply for assignment of the widow's dower, at any time after the husband's death, and thus terminate her quarantine."³

9. "There remains only the question," the court proceeded to say, "whether, if, at the death of the husband, a portion of the plantation be rented out and possessed by a tenant, the widow is entitled to the possession or receipt of rents of that third part, and the question is not without difficulty. On the one hand it forms a portion of the plantation, to the whole of which she is entitled; and

¹ 1 Rev. Stat. Misso. 1855, p. 670, § 11; p. 672, § 21.

² *Orrick v. Robbins*, 34 Misso. 226.

³ Post, ch. viii.

on the other hand, the statute, which confers this right, apparently supposes an actual possession in the husband, to which she succeeds, by providing that she shall remain in the mansion-house, &c. If there be distinct farms or plantations upon one tract of land, it is clear that the widow has her quarantine of that only which belonged to the capital mansion-house of her husband; that is, of the farm upon which was situated the house usually occupied by the husband immediately before the time of his death. Again, there may be one farm composed of several distinct tracts of land, and it appears probable that in such a case the widow would be entitled to her quarantine of the whole. If the owner of a plantation rent out a particular field, or a part of it, that is not necessarily a separation of the field or part from the plantation. Whether it be or not is a question of fact for determination in each case. If it be not permanently separated, yet the widow's right being merely possessory, and she being unable to have actual possession during the term created by her husband, she can not have her quarantine of such rented part until the term shall expire, and then her right would immediately attach. In this case, therefore, we think the widow's right in the rents collected by the administrator to be as follows: for the rents received for the unexpired term created by her husband, she was entitled only to a part thereof, in proportion to her general interest as dowress in the real estate; and from the time of the expiration of the term created by the husband to the time of the assignment of her dower she was entitled to the whole rent."

10. The provision for quarantine relates only to the claim of the widow against the heirs, or those claiming the estate under her deceased husband, and does not apply to strangers, or persons claiming by an adverse title. She is in no better condition to defend her possession against an adverse or paramount title, than her husband would have been.¹

11. Where a widow obtained a decree against an infant heir, directing commissioners to assign dower, which she might have had executed immediately, but delayed for a year, during which time she remained in the mansion-house and consented to the cultivation

¹ *Taylor v. McCrackin*, 2 Blackf. 260; *Shelton v. Carrol*, 16 Ala. 148; *Oakley v. Oakley*, 30 Ala. 131. But where the widow is allowed by statute to remain in possession until her dower is set out, she may defend her possession against the alienee of her husband. *Shelton v. Carrol*, 16 Ala. 148; *Cook v. Webb*, 18 Ala. 810; *Pharis v. Leachman*, 20 Ala. 662.

of the land by the agent of the heir; and after her dower was assigned, received one-third of the rents of the messuage and plantation thereto belonging, accrued before dower was assigned, claiming no more at the time; and subsequently brought an action to recover the other two-thirds of the rents, the court, although in doubt as to the extent of the right of quarantine under the Virginia statute,¹ held that she must be content with the arrangement that she had made, and disallowed her claim for the additional rents.²

12. A grantor gave an absolute deed of real estate, and at the same time took from the grantee an acknowledgment that he held the land charged with the settlement of the just debts of the grantor. It was held that the widow of the latter, who had intermarried with him since the execution of the deed, was dowable of the property so conveyed; and as against the grantee was entitled to the possession of the mansion-house, although embraced in the grant, and might defend her possession as widow and dowress against an action of ejectment brought by him.³

13. It has been decided in North Carolina, that a widow who, after the death of her husband, occupies his residence, his children, some of whom are of age, living with her, is under no obligation to pay the taxes accruing thereon between his death and the assignment of her dower; and consequently that a purchase by her of the premises for such taxes, made after the assignment of dower, without actual fraud, will not be set aside in favor of her husband's creditors.⁴

14. The heir can not maintain an action for a trespass committed on the quarantine lands of the widow before an assignment of dower.⁵ The case in which this point was determined arose under an early Virginia statute, permitting the widow to occupy the plantation on which her husband resided until the assignment of her dower.⁶ Upon the trial, the defendant moved the court to direct the jury that in a case of intestacy there was no possession by the heir of any part of the estate on which the mansion-house stood, although the same should not be a part of the enclosed land. The court held that the heir could not be regarded as in possession until the dower was assigned. The plaintiff then offered to prove that

¹ 1 Va. Rev. Code, ch. 107, § 2.

² *Grayson v. Moncure*, 1 Leigh, 449.

³ *Doe v. Bernard*, 7 Smedes & Marsh. 319.

⁴ *Branson v. Yancy*, 1 Dev. Eq. 77.

⁵ *Latham v. Latham*, 3 Call, 181.

⁶ See ante, § 4, note.

the trespass was committed on certain woods, part of the tract of land on which the mansion-house was situated; but the court decided that no testimony to prove such trespass during the life of the widow and prior to the assignment of dower could be given. A verdict and judgment for the defendant were affirmed on error.

Forfeiture of quarantine.

15. By the common law a widow forfeits her quarantine by a second marriage. "Therefore if she marry within the forty days she loseth her quarantine, for then her widowhood is past, and she hath provided for herself, and the quarantine is appropriate to her widow's estate."¹ So if she depart from her husband's house during the period allotted for her quarantine, her right is thereby determined.²

16. The rule is not uniform on this subject in the American States. In Virginia, a removal from the premises by the widow does not forfeit her quarantine. She may occupy and cultivate the land herself, or allow another to do it for her.³ The rule is the same in Alabama. "Having the right of possession by the statute," say the court in a case determined in that State, "she is entitled to recover the rents and profits, and may hold the premises free from molestation or rent. Nor could it have been the object of the statute to coerce her to remain in person on the premises; or rather, to make her title depend on that condition; for it may be that she could only derive her support from the premises by renting them; and to hold that the mere removing from the premises defeats this right, might in many instances, defeat the very intent of the statute, which is a provision for the widow until her dower is set apart for her."⁴ But this right to occupy the premises, or to receive the profits for her maintenance, is so far personal to the widow that it can not be transferred to another; and if, before her dower is assigned, she make a conveyance of her interest, the heir may recover in ejectment against the alienee.⁵ It has been held in Missouri, however, that the right of the widow to remain in the mansion-

¹ 2 Inst. 17; Co. Litt. 32 b., 34 b; 9 Vin. Abr. 272, title Dower, (I. a.) pl. 2; 1 Roper, H. & W. 388; Tud. Cas. 51.

² Hobart, 153; 1 Roper, H. & W. 388. ³ McReynolds v. Counts, 9 Gratt. 242.

⁴ Inge v. Murphy, 14 Ala. 289; Shelton v. Carrol, 16 Ala. 148; Oakley v. Oakley, 30 Ala. 131.

⁵ Wallace v. Hall, 19 Ala. 367.

house may be assigned.¹ In Kentucky, the widow may, at her option, occupy the mansion-house and premises attached, or rent them out and receive the issues.² But if, without being deforced, she leave the premises unoccupied and uncontrolled by her; that is, if she abandon them, and the heirs take possession, she has no right or remedy under this provision of the law; she is not entitled to recover rents of the heirs, but can claim her dower, only, and one-third of the annual value.³ And where the widow abandoned the mansion-house and premises, and the grandfather of the heirs leased them to tenants, it was held that the lease was to be regarded as for the benefit of the heirs, and not as continuing the widow's possession.⁴ But in Alabama, if dower has not been assigned, and the administrator rent the plantation on which the husband resided at the time of his death, the heirs can not maintain an action against him for the rents.⁵ In Mississippi it is held that quarantine is a personal privilege which can not be transferred, and that the heirs may maintain ejectment for the mansion-house against third persons claiming under the widow before the assignment of her dower.⁶ Still, a mere permissive occupancy will not affect her right. If it be shown that the premises are held in possession by a third person with the consent of the widow, yet unless there is evidence that she has given a lease, or actually transferred her privilege, her right of quarantine is not impaired, and she may be let in to defend, and successfully maintain her right of possession.⁷

17. It seems that in the United States a marriage by the widow does not work a forfeiture of her quarantine.⁸

Right of quarantine not subject to levy and sale on execution.

18. We have seen that a right of dower, before there has been an assignment to the widow, is not subject to levy and sale on exe-

¹ Stokes v. McAllister, 2 Misso. 163.

² Hyzer v. Stoker, 3 B. Mon. 117; Burk v. Osborn, 9 B. Mon. 579; White v. Clarke, 7 Mon. 640; Renfroe v. Taylor, 12 B. Mon. 407. See, also, Clark v. Brownside, 15 Ill. 63, 66.

³ Burk v. Osborn, 9 B. Mon. 579; Hyzer v. Stoker, 3 B. Mon. 117.

⁴ Burk v. Osborn, 9 B. Mon. 579. ⁵ McLaughlin v. Goodwin, 23 Ala. 846.

⁶ Wallis v. Smith, 2 Smedes & Marsh. 220.

⁷ Doe v. Bernard, 7 Smedes & Marsh. 319.

⁸ Shelton v. Carrol, 16 Ala. 148. See, also, Phariz v. Leachman, 20 Ala. 662; McReynolds v. Counts, 9 Gratt. 242; White v. Clarke, 7 Mon. 640.

cution at law.¹ The rule is the same with respect to the right of quarantine.²

Remedy of the widow where she has been deforced of her quarantine.

19. By the common law, if the widow was evicted before the expiration of her quarantine, by the heir or terre-tenant, she was entitled to the writ *de quarantinâ habendâ*, a summary process by which she was speedily restored to her possession.³ Lord Coke, says: "If the widow be withholden from her quarantine, she shall have her writ *de quarantinâ habendâ* to the sheriff, which, reciting this statute,⁴ is in nature a commission to him. . . . By force of which writ the sheriff may make process against the defendant returnable within two or three days, &c., and may, and ought (if no just cause may be shewed against it) speedily to put her in possession; and the reason why such speed is made, is for that her quarantine is but for forty days."⁵ The following from Fitzherbert, is upon the same subject:⁶ "The writ of *quarantinâ habendâ* lieth, where a man dieth seized of any messuage and lands, &c., and immediately after the death of the husband, the heir, or he who ought to have the lands after his death, will put the wife out of the messuage, &c. Then the wife shall have this writ, for by the statute of *magna carta*, cap. 7, the wife shall remain in the capital messuage after the death of her husband by forty days, if it be not a castle; and that writ is vicontiel, and shall be directed unto the sheriff, and he should hold plea thereof.⁷ . . . And upon that writ the sheriff shall

¹ Ante, ch. ii., §§ 26-32.

² *Wallis v. Smith*, 2 Smedes & Marsh. 220; *Cook v. Webb*, 18 Ala. 810.

³ 2 Inst. 16; Co. Litt. 34 b.; Fitzh. N. B. 162; 1 Roper, H. & W. 389.

⁴ *Magna Carta*, chapter 7.

⁵ 2 Inst. 16.

⁶ Fitzh. N. B. 161-2.

⁷ The following is the form of this writ as given by Fitzherbert: "The King to the sheriff, &c., or to his bailiffs of S. greeting: We have received information by the complaint of B., who was the wife of D., that whereas, it is contained in the great charter of the liberties of England, that widows shall remain in the capital messuage of their husbands for forty days after the death of their said husbands, unless those messuages be castles, within which time their dowers shall be assigned to them, and that in the meantime they shall have reasonable estovers of the goods thereof; I. of C. violently ejected her, the said B. immediately after the death of her aforesaid husband from the capital messuage, which was his, the said D.'s in H., (although it is not a castle, and her dower was not assigned to her), and did not permit her to take her estover of the goods thereof, to the great damage and grievance of her, the said B., and contrary to the tenor of the charter aforesaid: And be-

award process against the party to come and answer the same, and shall not stay until the county court be holden; for this writ is a commission unto him, and upon the same he shall immediately make process against the party for to answer, &c. within two or three days, according to his discretion, and thereupon to proceed as justices shall do upon a commission of oyer and terminer."

In pleading quarantine, the widow was required to show with certainty the period when her husband died, and the time of the expiration of the forty days.¹

20. With but few exceptions, the statutes in the American States are silent in regard to the remedy proper to be pursued by the widow where she has been ejected from the premises held by her in virtue of her right of quarantine. In Virginia, there was formerly a statutory provision to the effect that if she was deforced before assignment of her dower she should have a vicontiel writ in the nature of a *de quarantinâ habendâ*.² By the present statute of that State, the widow, if deforced of her possession, may, on complaint of unlawful entry or detainer, recover the possession, with damages for the time she was so deprived.³ In Kentucky, it is said that she is entitled to a speedy remedy to have possession restored to her.⁴ In Missouri, in an early case, it was declared that ejectment is the appropriate remedy to regain possession should the widow be evicted.⁵ It is obvious that except in those States where the common law right of quarantine has been considerably enlarged, to compel the widow to resort to an action of ejectment, is equivalent to an entire deprivation of her privilege. Justice would seem to require that a more summary remedy should be furnished her, analogous to that provided at common law. Perhaps the statutes of many of the States regulating proceedings in forcible entry and detainer, are sufficiently comprehensive to embrace the case of a

cause we will not that the aforesaid B. be injured in this matter, we command you that, having called before you the parties aforesaid, and having heard from them severally their reasons thereupon, you cause to be done to her, the said B, full and speedy justice thereupon, according to the tenor of the charter aforesaid, lest for want of justice, repeated complaint shall come to us. Witness, &c." Fitzh. N. B. 161-2.

¹ Kettlesby v. Kettlesby, Dyer, 76 b.; 1 Roper, H. & W. 389.

² Act of 1785, 12 Hen. Stat. 162; 1 Virg. R. C. 1819, c. 107, § 3.

³ Va. Code, 1849, p. 475, § 8.

⁴ Stewart v. Stewart, 3 J. J. Marsh. 48; Burk v. Osborn, 9 B. Mon. 579.

⁵ Stokes v. McAllister, 2 Misso. 163.

widow who has been forcibly dispossessed of the premises allotted her by law for her quarantine.

Termination of the quarantine.

21. At common law the right of the widow to occupy the chief house and messuage of her husband ceases with the expiration of her quarantine. Unless her dower has been assigned within the prescribed period, the heir may expel her from the premises, and compel her to resort to legal proceedings for the recovery of her dower.¹ Mr. Justice Gould, on one occasion, said: "If dower be not assigned to her within forty days, may she not continue until it be assigned to her? I think the court would not turn her out until dower was assigned to her."² But this doctrine is opposed to the clear weight of authority, and, indeed, Lord Chief Justice De Grey, in subsequently delivering the opinion of the whole court in the same case, placed the decision upon grounds entirely at variance with these hastily expressed views of Mr. Justice Gould.³ And he remarked: "If the law be so, we can not determine to the contrary upon inconvenience or the hardship of the law."⁴

22. In an early case in New York, it was made a question whether, under the phraseology of the statute of that State, the widow was not entitled to remain on the premises of her husband until her dower was assigned. The point was thus disposed of: "The privilege of the widow to 'tarry in the chief house of her husband for forty days, or until her dower be assigned her,' does not protect her from an action of ejectment by the heir, or any person deriving title from him, after the forty days have elapsed. There is some difference between the words of our statute,⁵ and *magna carta*, (c. 7), from which the statute was taken; but it is a difference, I apprehend, in the words, only. In the former the expression is, that the widow 'shall tarry forty days, &c., or until her dower be assigned,' &c., and in the latter, she 'shall tarry forty days, &c., *within which time* her dower,' &c. It is supposed that

¹ Co. Litt. 34 b.; Jenk. Cent. 284, Cas. 16; 4 Kent, 61; Jackson v. O'Donaghy, 7 John. 247; Siglar v. Van Riper, 10 Wend. 414, 419; McCully v. Smith, 2 Bailey, 103; Evans v. Webb, 1 Yeates, 424. See ante, ch. ii.

² In Newman's Lessee v. Newman, 3 Wils. 519.

³ See Evans v. Webb, 1 Yeates, 424; Jackson v. O'Donaghy, 7 John. 247.

⁴ 3 Wils. 522.

⁵ 1 Rev. Laws, 51; 1 N. R. L. 56.

under our statute the widow has a right to her quarantine until her dower be assigned her. If this had been the intention of the legislature, then the limitation of it to forty days would be useless. The construction, therefore, of our statute and *magna carta* must be the same; and that of the latter appears to be well settled."¹

23. But in several of the States this rule of the common law has been abrogated, and the widow is expressly permitted to continue in possession until her dower is assigned. This is the case in Kentucky,² Alabama,³ Arkansas,⁴ Georgia,⁵ Virginia,⁶ New Jersey,⁷ Missouri,⁸ Connecticut,⁹ Vermont,¹⁰ Mississippi,¹¹ Kansas,¹² Illinois,¹³ and the law was formerly the same in Indiana.¹⁴

¹ Jackson v. O'Donaghy, 7 John. 247.

² Driskell v. Hanks, 18 B. Mon. 855; Chaplin v. Simmons, 7 Mon. 338; White v. Clarke, Ibid. 640; Carey v. Buntain, 4 Bibb, 217; Roberts v. Commonwealth, 11 B. Mon. 4; Singleton v. Singleton, 5 Dana, 87; Burk v. Osborn, 9 B. Mon. 579; McConnell v. Bowdry, 4 Mon. 392, 399; Stewart v. Stewart, 3 J. J. Marsh. 48; Hyzer v. Stoker, 3 B. Mon. 117. See ante, § 4, and note.

³ Clay's Dig. 173, § 7; Inge v. Murphy, 14 Ala. 289; Shelton v. Carrol, 16 Ala. 148, 152; Oakley v. Oakley, 30 Ala. 131; Pharis v. Leachman, 20 Ala. 662; McLaughlin v. Goodwin, 23 Ala. 846; Cook v. Webb, 18 Ala. 810.

⁴ Dig. Stat. Ark. 1858, p. 453, § 18; Menifee v. Menifee, 3 Eng. 9; Hill v. Mitchell, 5 Ark. 608; Morrill v. Menifee, Ibid. 629.

⁵ Act Dec. 21, 1839; Hotchk. 433; Rambo v. Bell, 3 Kelly, 207.

⁶ McReynolds v. Counts, 9 Gratt. 242. See ante, § 4, and note.

⁷ Nixon's Dig. p. 209, § 2; Den v. Dodd, 1 Halst. 367; Ackerman v. Shelp, 3 Halst. 125.

⁸ 1 Rev. Stat. Misso. 1855, p. 672, § 21; Stokes v. McAllister, 2 Misso. 163.

⁹ Stedman v. Fortune, 5 Conn. 462. See ante, § 4, and ch. ii., § 24.

¹⁰ Gorham v. Daniels, 23 Verm. 600. See ante, § 4, and ch. ii., § 24.

¹¹ Rev. Code Missis. 1857, p. 470, art. 174.

¹² Comp. Laws Kansas, 1862, p. 480, § 16.

¹³ 1 Stat. Ill. 1858, p. 155, § 27.

¹⁴ Ind. R. C. 1831, p. 209; Rev. Stat. 1838, p. 239; Grimes v. Wilson, 4 Blackf. 331. See ante, § 4.

CHAPTER IV.

ASSIGNMENT OF DOWER BY THE TENANT OF THE FREEHOLD.

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| § 1, 2. Dower may be assigned without resort to legal proceedings. | 13-15. Assignment by joint tenant. |
| 3-5. And by parol. | 16-21. Assignment according to common right. |
| 6, 7. The assignment must be made by the tenant of the freehold. | 22-35. Assignment contrary to common right. |
| 8-10. Not essential that he should have a valid title. | 36. Crops. |
| 11. Assignment by infant. | 37. Estoppel arising from assignment of dower. |
| 12. Assignment by guardian. | |

Dower may be assigned without resort to legal proceedings.

1. THE widow is entitled to be endowed immediately after her husband's death; and we have seen that by *magna carta* it was required that her dower should be set out to her within forty days after the happening of that event.¹ In several of the United States, also, this duty is enjoined upon the heir; but in some of them the period within which it is to be performed is different from that prescribed by the common law. It follows from this requirement that it is not necessary to a valid assignment of dower, that legal proceedings should be instituted by either party. The person on whom the right or duty is devolved of making the assignment, may at once proceed to set apart to the widow her proportion of the estate; and if this be fairly done, it is as effectual and binding as if performed under a judgment or decree of the court.²

¹ Ante, ch. iii.

² 1 Roper, H. & W. 389; Park, Dow. 265, 266; 4 Kent, 63; Baker v. Baker, 4 Greenl. 67; Young v. Tarbell, 37 Maine, 509; Curtis v. Hobart, 41 Maine, 230; Austin v. Austin, 50 Maine, 74; Jones v. Brewer, 1 Pick. 314; Conant v. Little, Ibid. 189; Shattuck v. Gragg, 23 Pick. 88; Johnson v. Morse, 2 N. H. 48; Pinkham v. Gear, 3 N. H. 163; Meserve v. Meserve, 19 N. H. 240; Clark v. Muzzey, 43 N. H. 59; Robinson v. Miller, 1 B. Mon. 88; s. c. 2 B. Mon. 284; Stevens v. Stevens, 3 Dana, 371; Mitchell v. Miller, 6 Dana, 79; Harrow v. Johnson, 3 Met. (Ky.) 578; McCormick v. Taylor, 2 Carter, (Ind.) 336; Boyers v. Newbanks, Ibid. 388; Moore v. Waller, 2 Rand. 418; Menifee v. Menifee, 3 Eng. 9; Shelton v. Carrol, 16 Ala.

2. The statutes of a number of the States point out the manner in which the assignment shall be made.¹ In Iowa,² the share of the widow may be set off by mutual consent of all parties interested. In Ohio,³ if the lands are not incumbered by mortgage, or by judgments recovered in the lifetime of the deceased, the heir, or person having the next estate of inheritance, is authorized to assign the dower. In Illinois,⁴ the dower is required to be set out by the heir or tenant of the freehold as soon as practicable after the death of the husband. In Connecticut,⁵ a mode is provided for dividing the estate between the widow and heir without suit. And in Rhode Island⁶ and Arkansas,⁷ special provision is made for the assignment of dower by amicable proceedings. Most of the statutes upon this subject provide that an assignment by the tenant shall not be binding upon the widow unless it is accepted by her;⁸ and in New Hampshire, the same rule is applied by the courts.⁹

The assignment may be by parol.

3. Dower may be assigned by parol. The widow being entitled by common right, nothing is required but to ascertain her share; and when that is accomplished by the assignment, and she has entered, the freehold vests in her without livery of seizin or

148; *Johnson v. Neil*, 4 Ala. 166; *Sutton v. Burrows*, 2 Murph. (N. C.) 79; *Crocker v. Fox*, 1 Root, 227; *Hill v. Mitchell*, 5 Ark. 608; *Morrill v. Menifee*, *Ibid.* 629; *Den v. Miller*, 1 South. 321. Where a widow has entered and occupied a tract of land for more than twenty years, claiming it as her dower, *quære*, if the law will not presume an assignment by the heirs. *McMillan v. Turner*, 7 Jones, L. 435. The expenses incurred in making the assignment must be borne by the tenant. *Harshaw v. Davis*, 1 Strobb. 74.

¹ 2 Comp. Laws Mich. 1857, p. 854, § 28; 1 Stat. Ill. 1858, p. 153, § 17; 1 Rev. Stat. Ohio, p. 520, § 8; Laws of Iowa, Rev. 1860, p. 415, § 2427; Stat. Conn. 1854, p. 499, § 46; Gen. Stat. Verm. 1863, p. 413, § 12; Rev. Stat. R. I. 1857, p. 503, § 4; p. 504, § 5; Dig. Stat. Ark. 1858, p. 455, §§ 30-32. See post, §§ 3-5.

² Laws of Iowa, Rev. 1860, p. 415, § 2427. ³ 1 Rev. Stat. Ohio, p. 520, § 8.

⁴ 1 Stat. Ill. 1858, p. 153, § 17.

⁵ Stat. Conn. 1854, p. 499, § 46. ⁶ Rev. Stat. R. I. 1857, p. 503, § 4; p. 504, § 5.

⁷ Dig. Stat. Ark. 1858, p. 455, §§ 30-32.

⁸ 2 Comp. Laws Mich. 1857, p. 854, § 28; 1 Rev. Stat. Ohio, p. 520, § 8; Laws of Iowa, Rev. 1860, p. 415, § 2427; Rev. Stat. Wis. 1858, p. 549, § 28; Stat. Conn. 1854, p. 499, § 46; Stat. Minn. 1858, p. 410, § 28; 1 Rev. Stat. N. Y. p. 743, § 23; Dig. Stat. Ark. 1858, p. 455, §§ 30-32; Rev. Stat. R. I. 1857, p. 503, § 4; p. 504, § 5; Stat. Oregon, 1855, p. 408, § 28.

⁹ *Johnson v. Morse*, 2 N. H. 48; *Clark v. Muzzey*, 43 N. H. 59.

writing.¹ And this is true, not only when the dower is assigned in the manner prescribed by law, but also where a different mode of assignment is adopted by agreement; as where a rent issuing out of the lands,² or an undivided third part³ is allotted to the widow.⁴

4. Remarking upon this subject, Mr. Park says:⁵ “Although no estate is vested in the dowress until the certainty of the land is ascertained by assignment, yet as the estate, although suspended in the meantime, does not *pass* by the assignment, but the dowress is in, in intendment of law, by her husband, neither livery nor writing is essential to the validity of an assignment. In the very learned reasons for the appeal in *Rowe v. Power*,⁶ drawn up by Mr. Hargrave, it was contended that this was only true as applicable to assignments according to *common right*, and that even a tenant in fee could not, by mere agreement with a widow, and without livery, pass a legal estate in dower to her by assigning an *undivided third*, that being against common right. It was therefore contended, that an assignment of dower in the form of an undivided third by a *tenant in tail* solely seized, and accompanied with livery, was nothing more or less than a lease or feoffment for life by tenant in tail, not warranted by the enabling statute of the 32 of Henry the VIII. This argument is negatively opposed by the current of authorities in the old books assuming an assignment against common right by parol to be valid,⁷ and it meets with but little support from principle. The law does not suppose that because a woman takes an *assignment* of dower against common right she takes thereby anything short of an *estate in dower* properly so called,

¹ Co. Litt. 35 a.; Park, Dow. 269; 4 Kent, 63; *Rowe v. Power*, 2 Bos. & Pul. N. R. 1, 34; *Conant v. Little*, 1 Pick. 189; *Jones v. Brewer*, Ibid. 314; *Shattuck v. Gragg*, 23 Pick. 88; *Blood v. Blood*, Ibid. 80; *Johnson v. Morse*, 2 N. H. 48; *Pinkham v. Gear*, 3 N. H. 163; *Meserve v. Meserve*, 19 N. H. 240; *Baker v. Baker*, 4 Greenl. 67; *Curtis v. Hobart*, 41 Maine, 230; *Austin v. Austin*, 50 Maine, 74; *Boyers v. Newbanks*, 2 Carter, (Ind.) R. 388; *Johnson v. Neil*, 4 Ala. 166. But no fraud must be practised on the widow. *Johnson v. Neil*, 4 Ala. 166.

² Co. Litt. 34 b.; Jenk. p. 9; Perk. § 406; 9 Vin. Abr. 263, pl. 2.

³ *Coots v. Lambert*, Co. Litt. 32 b., note 1; Sty. 276; 1 Roll. Abr. 682; *Rowe v. Power*, 2 Bos. & P. N. R. 34.

⁴ 1 Roper, H. & W., by Jacob, 392.

⁵ Park, Dow. 269, 270.

⁶ *Rowe v. Power*, *supra*.

⁷ It was admitted in the reasons for the appeal that the case of *Coots v. Lambert*, *supra*, was an authority to the contrary, but the plaintiff in error claimed, if necessary, to controvert that case.

and if she takes an estate in dower she must take it as an emanation from the estate of her husband, and not as a freehold created *de novo* by the heir. All the books testify that if a woman accepts an assignment of dower by word against common right, *she* is bound by it, and can not afterwards demand her dower to be assigned to her in the strict manner. Now if such assignment against common right was to be considered merely as a *grant* by the heir in satisfaction or allowance of her dower, such grant could not be a bar to her, for the right to an estate of freehold can not be barred by a collateral recompense. It will indeed be found from the books that even a rent assigned in allowance of dower of land or a capital messuage is good without deed,¹ which plainly shows that it is considered as coming in lieu and in the nature of dower. And such rent must be pleaded by the word *assignavit*,² and not *dedit*.³

5. But in some of the States it is required that the assignment shall be in writing. This is the case in Rhode Island,⁴ Arkansas,⁵ Ohio,⁶ and Connecticut.⁷ In Ohio,⁸ the assignment must be under the hand and seal of the person making it. In Connecticut,⁹ the parties legally capable to act may make a division of the lands by an instrument in writing under their hands and seals, duly acknowledged and recorded in the probate court. In Arkansas,¹⁰ if the dower assigned by the heir be accepted by the widow, he is required to make a statement of such assignment, specifying what lands have been set off; the acceptance of the widow is to be endorsed thereon; and such statement and specification of dower and acceptance must be proved or acknowledged by both parties, and filed with and recorded by the clerk of the court of probate. If the heir be a minor, he must act by his guardian.

¹ 12 Hen. IV. 176; 7 Hen. VI. 33 b.; Jenk. Cent. 1, Ca. 17; Hob. 153; Perk. § 406.

² Post, § 26.

³ Wentworth's case, Cro. Eliz. 452. It is to be observed that the assignment here spoken of, although contrary to common right, is of lands of which the wife is dowable, or of rent issuing out of such lands. As to the rule where the endowment is of other lands, or of rent issuing out of other lands, see post, §§ 27-30.

⁴ Rev. Stat. R. I. 1857, p. 503, § 4; p. 504, § 5.

⁵ Dig. Stat. Ark. 1858, p. 455, §§ 30-32.

⁶ 1 Rev. Stat. Ohio, p. 520, § 8.

⁷ Stat. Conn. 1854, p. 499, § 46.

⁸ 1 Rev. Stat. Ohio, p. 520, § 8.

⁹ Stat. Conn. 1854, p. 499, § 46.

¹⁰ Dig. Stat. Ark. 1858, p. 455, §§ 30-32.

The assignment must be made by the tenant of the freehold.

6. The assignment of dower in certainty being an act involving the interests of the persons entitled to the inheritance, it became requisite that no one should be legally competent to assign dower who had a less estate than one of freehold. As no tenant of an inferior nature was capable of binding the rights of a freeholder in a real action,¹ and consequently, as judgment obtained on a writ of dower brought against a person having merely a chattel interest, would be voidable by the freeholder, the consistency of the law required that such person should not bind the freeholder by assigning dower without action. A person having only a chattel interest is not intrusted with the defence of the inheritance,² and the freeholder might possibly have had a good bar to allege to the claim of dower. The propositions are indeed conversible, that against whomsoever a writ of dower will lie, that person is competent to make a valid assignment; or in other words, whoever is compellable by writ to assign dower, may do it without writ.³ It will accordingly be found laid down in the books, that an assignment of dower by a guardian in socage,⁴ a tenant by elegit, statute staple, or statute merchant, or a lessee for years, is not good.⁵ An exception to this doctrine existed formerly in the case of a guardian in chivalry, founded upon reasons which it is no longer of practical importance to inquire into.⁶

7. By statute in Rhode Island,⁷ the tenant in possession, though having but a term for years, first giving notice to the owners of the next estate of freehold or inheritance, and inviting them to join with him, if they will, may, upon demand of the widow upon him and them, set off her dower; and the assignment so made, if fairly and honestly done, will bind his landlord or co-tenant of the freehold, and all others. In Vermont,⁸ in case of an insolvent estate,

¹ See post, ch. v., § 3.

² See as to the qualification of this rule in several of the American States, post, ch. vi., §§ 24, 25.

³ Park, Dow. 265, 266; 1 Roper, H. & W. 389; Co. Litt. 34 b., 35 a.

⁴ See post, § 12.

⁵ Perk. § 404; Co. Litt. 35 a.; 6 Rep. 57 b. A *quære* is made as to a guardian in socage in 1 Roll. Abr. 682.

⁶ Park, Dow. 266. See Co. Litt. 35 a., 38 b.; Perk. § 403; 9 Co. 17 a.; 6 Co. 57 b.; Bract. 314.

⁷ Rev. Stat. R. I. 1857, p. 504, § 5. ⁸ Gen. Stat. Verm. 1863, p. 413, § 12.

the widow and such part of the creditors as have two-thirds in amount of the debts against the deceased, may agree upon a portion of the real estate to be assigned to her during her life, or of personal estate to be set off to her absolutely, in lieu of dower; and such agreement, if approved by the Probate Court, and the estate is set out accordingly, will be valid and binding. In Kentucky, it has been held, that where executors have the power to sell, and are invested with the title to the lands of the testator, they may make an agreement to assign a part thereof to the widow for dower, in consideration of her releasing the residue, which, in the absence of collusion between them and the widow, will bind the heirs as well as the creditors. And although the agreement be not in writing, the general creditors of the husband, for whose benefit the release from the widow was procured, are not entitled to the aid of a court of equity for the purpose of taking the land from her under the devise to the executors, in violation of such agreement. Nor will the fact that the widow obtained a good bargain, enable the creditors to set aside the agreement, even though the circumstances be such as to render the executors personally liable to them.¹

Not essential that the tenant should have a valid title.

8. It is not necessary to the validity of the assignment that the estate of the person making it should be a lawful freehold; because assignment of dower is a legal obligation upon the tenant of the freehold, whether he obtain it by right or by wrong; and if by wrong, the widow is not obliged to wait for an assignment until the heir thinks proper to enter and defeat the tortious estate, an event which may never happen. If, therefore, an abator, disseizor, or intruder make the assignment, as the lawful tenant ought to have done, it will be good and binding upon such tenant.²

9. But if the tortious freehold of the person making the assignment be obtained by collusion with the widow, in order to enable him to assign the dower, then, although the assignment will not be absolutely void, yet it will be voidable by the entry of the heir.³

¹ Harrow v. Johnson, 3 Met. (Ky.) 578.

² Perk. § 394; Co. Litt. 35 a., 357 b.; 2 Co. 66 b.; 6 Co. 58 a.; 1 Roper, H. & W 389-90; Park, Dow. 266.

³ Co. Litt. 35 a.

Of such a case Lord Coke says: "The fraud or covin suffocated the widow's right, and the wrongful manner by which the freehold was acquired, avoided the matter that was lawful;"¹ in other words, rendered voidable the endowment, though made by a person competent to make it.² The same consequences follow, if, under like circumstances, the assignment of dower be fairly made of an equal third part to the widow, by the sheriff, after she has obtained a judgment for her dower.³ The heir, in such case, may treat the widow as a disseizor, she having made herself a party to the disseizin.⁴

10. The law, however, only countenances the acts of persons acquiring estates by wrong, from necessity; and in the present instance for the benefit of the widow, whose endowment might otherwise be totally prevented. At the same time that it guards against this inconvenience, it protects the right of the lawful heir; and lest he might be injured by the transaction, it supports only such assignment of dower by parties having a tortious possession, as the heir, if he had been in possession, would have been bound to make. Dower is assignable, as will be hereafter shown,⁵ either according to common right, or specially, and against common right. An assignment of dower according to common right, if made by a person possessed of the freehold by right or by wrong, is, as we have seen, binding both upon the wife and upon all persons having interests in the lands assigned;⁶ an assignment against common right is binding upon neither further than they agree thereto;⁷ and therefore such assignment, if made by a person having only a particular or defeasible interest in the inheritance, though valid during the continuance of that interest if accepted by the wife,⁸ is not binding upon his successors, or other persons having title. So that if a disseizor, abator, or intruder assign to the widow a rent out of the lands for her dower, instead of assigning a third part of them according to the common law, the disseizee, or he

¹ Co. Litt. 35 a., 357 b.

² Plow. 51, 54; Perk. §§ 394, 395; Jenk. Cent. 4, Ca. 98; Park, Dow. 269.

³ Co. Litt. 35 a.; 1 Roper, H. & W. 390.

⁴ See Park, Dow. 269.

⁵ Post, §§ 16-35.

⁶ Perk. § 404. And see § 426, that if a disseizor assign dower [according to common right] and the disseizee enter upon the tenant in dower, she may have an assize against him. Park, Dow. 267, note.

⁷ Post, § 22.

⁸ See 2 Bos. & P. N. R. 33, in *Rowe v. Power*.

who has the right to the lands will not be bound by such assignment.¹ The assignment, however, stands good until avoided.²

Assignment by infant.

11. If the heir be an infant, he is, notwithstanding his minority, competent to assign dower; because he may be compelled to make the assignment by suit, in which he would not be permitted to take advantage of his infancy, so as to prevent an immediate assignment,³ since the widow's title to her dower is urgent, it being necessary for her immediate support.⁴

Assignment by guardian.

12. It has been shown that at common law a guardian in socage was not authorized to assign dower, though the rule was otherwise as to a guardian in chivalry.⁵ In the United States, however, it has been several times decided, that a guardian is competent to assign dower. The point was expressly so ruled in *Jones v. Brewer*,⁶ where the court said: "One question in this cause relates to the power of a guardian to assign dower. It is a well settled general principle, that a guardian can not, by his contract, bind the person or estate of his ward. The law is equally clear, that an infant is bound to set off the widow's dower. There are a great many cases in which infancy gives no privilege, as in the repairing of bridges, &c. The assignment of dower is a case where the least delay is admitted, and the question is, how is an infant to make the assignment? It can not be better done than by his guardian. The guardian, it is true, can not bind his ward by deed, but it is not necessary that the assignment of dower should be by deed.⁷ . . . The assignment is not a conveyance of an estate, but the dowress, by intendment of law, is in by her husband. A guardian

¹ Park, Dow. 267; 1 Roper, H. & W. 391; Perk. §§ 397, 398; Jenk. Cent. 1, Ca. 17; 6 Rep. 57 b.; Co. Litt. 35 a.

² Perk. § 404; Park, Dow. 268-9.

³ Post, ch. v., § 49.

⁴ 1 Roll. Abr. 137, 681; *Gore v. Perdue*, Cro. Eliz. 309; 1 Roper, H. & W. 389; Park, Dow. 268; *Young v. Tarbell*, 37 Maine, 509; *McCormick v. Taylor*, 2 Carter, (Ind.) 336; *Robinson v. Miller*, 1 B. Mon. 88; s. c. 2 B. Mon. 284; *Jones v. Brewer*, 1 Pick. 314, 317. See *Den v. Miller*, 1 South. 321. As to the remedy of the infant heir where he has made an excessive assignment, see post, ch. xxviii.

⁵ Ante, § 6.

⁶ *Jones v. Brewer*, 1 Pick. 314.

⁷ Ante, §§ 3-5.

must have power to assign dower, because otherwise the infant would be likely to suffer from want of discretion, if he assigned it himself, or be put to unnecessary expense, if the widow should be obliged to resort to process of law." The courts of Maine,¹ Indiana,² and Kentucky,³ have approved and followed this doctrine. And now by statute in several of the States the power to assign dower is expressly conferred upon the guardian.⁴

Assignment by joint tenant.

13. If two persons be joint tenants of an estate, under a devise or conveyance from a man whose widow is entitled to dower out of it, and one joint tenant assign a third part to her for dower, the assignment will be good and obligatory upon his companion; because he being tenant of the freehold *per mie et per tout*, is competent and compellable to make the assignment according to the rule of the common law.⁵

14. But if a joint tenant assign to the widow a rent out of the estate for dower, or otherwise endow her against common right, then his companion will not be bound by the assignment, for the same reasons which have been before mentioned,⁶ relative to similar assignments by persons seized of tortious freeholds.⁷

15. So a husband seized of lands jointly with, or in right of his wife, may assign dower to a woman entitled to it out of the estate, and his widow will not be permitted to defeat the assignment after his death;⁸ but it is presumed, upon the reasons before given, that the assignment must be such as the law authorizes to be made; namely, of a third of the lands, or the husband's widow may avoid it.⁹

Assignment according to common right.

16. The assignment of dower required by the common law, is of

¹ *Young v. Tarbell*, 37 Maine, 509; *Curtis v. Hobart*, 41 Maine, 230.

² *Boyers v. Newbanks*, 2 Carter, (Ind.) 388.

³ *Robinson v. Miller*, 1 B. Mon. 88; s. c. 2 B. Mon. 284.

⁴ Rev. Stat. Maine, 1857, p. 432, § 14; Gen. Stat. Mass. 1860, p. 545, § 20; Rev. Stat. Wis. 1858, p. 631, § 25.

⁵ 1 Roper, H. & W. 391; Park, Dow. 267; Co. Litt. 34 a., 35 b. As to joint tenancy in the United States, see vol. i., ch. xvi., §§ 6-12.

⁶ Ante, § 10.

⁷ Perk. § 397; 2 Co. 67 a.; Co. Litt. 34 b., 35 a.

⁸ 1 Roll. Abr. 681; Perk. § 399.

⁹ 1 Roper, H. & W. 391; Park, Dow. 267-8. And see Hargr. Co. Litt. 35 a., note (2).

one-third part of the lands and tenements of which the widow is dowable, to be set out by metes and bounds where it is practicable, and to be held by her for life. The endowment, therefore, must be of parcel of the lands and tenements themselves. Such is the widow's common law right, and the heir or tenant ought so to make the assignment.¹ When this rule of law has been complied with, the dower is said to have been set out *according to common right*.²

17. When the property does not admit of an assignment of dower in severalty, either from the nature of the husband's interest in it, or from the quality of the thing itself, the assignment by metes and bounds will of necessity be dispensed with. Thus, if the husband be seized in common, or in coparcenary, and die before partition, the widow can not have her dower assigned by metes and bounds, but shall have the third part of the share of her husband to hold in common with the heir and the other tenants.³ So if the property be indivisible in its nature, the widow must be content with a special endowment. Thus, if the husband die seized of a mill, she may be endowed either of the third toll dish, or of a third of the profits, or of the entire mill for every third month.⁴ So if the property be a ferry, one-third of the profits, or the use of the ferry for a third part of the time in alternate periods, should be set apart to the widow.⁵ So of many hereditaments which are not divisible, dower must be assigned specially, of a third part of the profits.⁶

18. It is said that at common law, the heir is not compellable to assign to his mother for her dower the capital messuage which was his father's, or any part thereof, although she be dowable of the same. But he may assign to her other lands and tenements of which she is dowable, in allowance of the capital messuage. But if there are no other lands or tenements of which she is dowable, and the heir assign unto her a chamber in the capital messuage, in the name of dower, and in allowance of the same messuage, and she agree

¹ Litt. § 36; Co. Litt. 34 b.; Perk. §§ 411, 414; *Pierce v. Williams*, 2 Penning. 521.

² Park, Dow. 251; 1 Washb. R. P. 2 ed. p. 223, pl. 4, 5.

³ Litt. § 44; Co. Litt. 32 b.; 2 Ld. Raym. 785; Fitzh. N. B. 149; Perk. § 412; vol. i., ch. xvi., § 13.

⁴ Co. Litt. 32 a.; Perk. § 342; Gilb. Dow. 397; N. Bendl. 120. And see 2 Keb. 8, 41; Perk. § 415, where it is added, "And she shall grind there toll free;" Fitzh. N. B. 149, (K.)

⁵ *Stevens v. Stevens*, 3 Dana, 371.

⁶ Park, Dow. 252; 1 Roper, H. & W. 396. See vol. i., ch. x., § 3; post, ch. xxi.

thereto, it is a good assignment. "But it seems," says Perkins, "that she is not compellable to take it, because the messuage is, as it were, an entire thing; and it shall be but trouble and vexation to a woman to have a chamber within the house of another man;¹ and if she will not agree to the same, then the heir may assign to her a rent issuing out of the same messuage in the name of her dower."²

19. In Illinois,³ the widow is entitled to have the homestead or dwelling-house included in the assignment if she desire it. So in Arkansas,⁴ provided it can be done without injury to the remainder of the premises. In Iowa,⁵ the dwelling-house and land given to the husband as a homestead, or so much thereof as is equal to the proportion of the widow, is to be embraced in the assignment of dower. In Mississippi,⁶ North Carolina,⁷ Tennessee,⁸ Alabama,⁹ and Florida,¹⁰ the dwelling-house, out-houses, and other improvements are to be comprehended in the part set off to the widow, provided it can be done without injustice to the children of the deceased.

20. The assignment of dower must be for the widow's life, whether the assignment be of common right, or of a compensation in lieu of dower. It is also essential that the assignment be absolute, unconditional, and without any exception or reservation in diminution of its value.¹¹ The reason mentioned in the books for this requisite is, that the widow's third part is a continuation of her husband's estate and interest; and that the heir or terre-tenant is but a minister of the law to assign and mark out such her share, and because, when her share is set out, she comes in by her husband, and her title has relation to his death.¹²

21. It was adjudged in an early case,¹³ that if dower be assigned

¹ Post, ch. xxi., §§ 5-7.

² Perk. § 406; Park, Dow. 254.

³ 1 Stat. Ill. 1858, p. 155, § 25.

⁴ Dig. Stat. Ark. 1858, p. 453, §§ 19, 20.

⁵ Laws of Iowa, Rev. 1850, p. 415, § 2426.

⁶ Rev. Code Missis. 1857, p. 161, art. 162.

⁷ Rev. Code N. C. 1855, p. 601, § 1.

⁸ Code Tenn. 1858, p. 474, § 2401.

⁹ Clay's Dig. p. 172, § 3.

¹⁰ Thompson's Dig. p. 184, § 1.

¹¹ Co. Litt. 34 b.; Hob. 153. See *Wentworth v. Wentworth*, Cro. Eliz. 452; *Noy*, 55; 1 And. 288. In equity, however, under the doctrine of election, the widow will be estopped from claiming her legal dower, if she accept a conditional compensation or assignment. Post, ch. xi.

¹² 9 Vin. Abr. 257, pl. 7, 8, 9; vol. i., ch. xiii., §§ 12, 13; 1 Bright, H. & W. 379.

¹³ *Bullock v. Finch*, 1 Roll. Abr. 682, pl. 45.

of the land, excepting the trees growing thereon, the exception will be void; and it is laid down in the old books, that at law, where dower is assigned upon condition, the assignment is good, but the condition bad.¹

Assignment contrary to common right.

22. An important distinction prevails between an assignment of dower made by the sheriff in pursuance of a judgment at law, and a voluntary assignment made by the heir or grantee. In the former case, the rules of law as to the mode in which dower shall be assigned according to the particular nature and circumstances of the property, are to be strictly pursued;² for although the wife should consent to take her dower in some other manner than that due of common right, yet the sheriff can not bind the heir or tenant,³ whose assent to an assignment against common right is as necessary as that of the wife; but on a voluntary assignment by the heir or terre-tenant, the parties may, by mutual agreement, waive a strict assignment according to the rules of law, and make such arrangement for the mode of enjoying dower as they think fit.⁴

23. It follows from what is above stated, that if a widow be dowerable of several manors, lands, tenements, commons, &c., she may accept an assignment for life of any one or more of them in lieu of her dower in all the rest; and such assignment, confirmed by entry will bind her, although it may be of less value than the third part of each.⁵ So she may accept an undivided third part in common, in lieu of a third part in severalty.⁶ And it is not necessary that

¹ Colthirst v. Bejushin, Plow. Com. 21; Laws of Baron and Feme, p. 105; Co. Litt. 34 b.; Park, Dow. 264-5.

² Booth v. Lambert, Styles, 276; Perk. § 414; 12 Edw. IV. 2. But see 18 Hen. VI. 27, contra.

³ See Perk. § 332. But see Anc. Entries, Qua. Imp. 529-10, and Qua. Imp. in Dow. 1, contra.

⁴ Park, Dow. 262; Hale v. James, 6 John. Ch. 258; Jones v. Brewer, 1 Pick. 314, 317; Draper v. Baker, 12 Cush. 288; Pinkham v. Gear, 3 N. H. 163; Robinson v. Miller, 1 B. Mon. 88; s. c. 2 B. Mon. 284; Mitchell v. Miller, 6 Dana, 79; Fowler v. Griffin, 3 Sandf. S. C. 385; French v. Pratt, 27 Maine, 381; French v. Peters, 33 Maine, 396; Johnson v. Neil, 4 Ala. 166; Fitzbush v. Foote, 3 Call, 13; Welch v. Anderson, 28 Misso. 293; Marshall v. McPherson, 8 Gill & J. 333; Beers v. Strong, Kirby, (Conn.) 19. See Booth v. Lambert, Styles, 276.

⁵ 1 Roll. Abr. 683; Perk. § 405; 2 New Rep. 33; 1 Roper, H. & W. 399.

⁶ Coots v. Lambert, (1651), Styles, 276; Co. Litt. 32 b. n. (1); 4 Kent, 64. And see, also, Rowe v. Power, 2 Bos. & P. N. R. 1; and Perk. § 413, who makes a *quære* on this point.

the third part of the thing of which she is dowable, should be assigned, for if the fourth part, the fifth part, or the moiety be set off to her in the name of dower for all the freehold which her husband had, and she agree thereto, it is a valid assignment.¹

24. In a case² where eighty-four acres of land were assigned to the widow for dower by the sheriff, out of lands mentioned in the writ addressed to him, upon a *scire facias* brought by the widow, suggesting that sixty of the eighty-four acres belonged to a stranger, and were not mentioned in the record, and that in consequence there ought to be a new division; the tenant in his defence said, that the difference, viz.: twenty-four acres, were parcel of the lands recovered by the widow in the suit, and had previously been entered upon by her in lieu and satisfaction of her dower. The judgment was that she was bound by her acceptance and entry upon the twenty-four acres, although they were less in quantity than a third of the whole mentioned in the record.

25. From the foregoing case, Mr. Roper deduces the conclusion that mere consent to accept dower contrary to common right, will not be sufficient to bind the widow; which, he adds, also appears from the form of the plea, that ought to contain the words, *quod intrando agreeavit*,³ or words in English of the same import.⁴

26. Where the tenant assigned to the widow twenty bushels of wheat every year for her life, out of the lands in which she was entitled to dower; that, being in the nature of a rent, and accepted by her, was holden to be a good assignment.⁵ So where a rent was granted by tenant in tail out of the estate to a widow, who was entitled to dower out of the lands, and she accepted the rent, this was determined to be a good assignment to the extent at least of excluding her right to endowment while the rent continued, and was not determined by the issue in tail.⁶ In pleading such an assignment the tenant should use the technical word, *assignavit*.⁷

27. And if a widow recover judgment for her dower out of cer-

¹ Perk. § 405; Park, Dow. 263. But it is said that *all* the land of the husband can not be assigned in the name of dower. Perk. § 408; *Stiner v. Cawthorne*, 4 Dev. & B. Law, 501.

² Moor, 679, pl. 928.

³ 3 Leon. 272.

⁴ 1 Roper, H. & W. 400.

⁵ Moor, 59, pl. 167; Dyer, 91 a., in margin.

⁶ *Bickley v. Bickley*, And. 287. And see Jenk. Cent. 1, Ca. 17; 1 Roll. Abr. 683; Bro. Dow. pl. 61; Perk. § 410; Park, Dow. 263.

⁷ See *Wentworth's case*, Cro. Eliz. 452; ante, § 4.

tain lands, and before execution she accept from the tenant an assignment of a rent out of them in lieu of dower, this assignment will be a good answer by the tenant to a *scire facias* brought by her to obtain execution upon the judgment, because the assignment is a compliance with and satisfaction of the judgment.¹ But the reverse would have been the case if the rent had been assigned out of lands in which the widow was not entitled to endowment, and therefore not the subject of the suit nor mentioned in the record, for then the assignment would not agree with the directions of the judgment, which only respected the lands of which the widow was dowable. This assignment, therefore, could not be a satisfaction of the judgment, and consequently no impediment to the widow obtaining execution under her *scire facias*.²

28. In discussing this point, Mr. Roper says:³ “It is observable that it was the widow’s consent, entry, and acceptance, which, in the above instances, gave validity to the particular assignments of dower against common right. But her consent will not avail to establish them when, from the nature of the transaction she can not have the like estate or interest in the subject assigned in lieu of dower, as she would have had if her dower had been assigned in the regular way, viz.: during her life. It may therefore be considered as settled at law, that an assignment with the consent and acceptance of the widow, of something in lieu of dower to which she is entitled of common right, must either be of some part of the lands of which she is dowable, or of a rent issuing out of them,⁴ and for such an interest as may endure for her life; and that if any of these particulars be wanting, the assignment will be void.⁵ Thus, if lands of which the widow is not dowable, be assigned without deed to her for life, as or in lieu of dower of lands to which that right attached, the assignment will be invalid, although she accepted it, because she could not enjoy the lands assigned during her life, for she having no interest in the lands given in lieu of dower, could only hold them as tenant at will, for want of livery of seizin to pass a freehold, *i. e.* to entitle her to them for her life; the law, therefore, will not permit such an interest to be a satisfac-

¹ 1 Roper, H. & W. 400. And see *Hanger v. Fry*, Cro. Eliz. 310.

² Perk. § 410; Park, Dow. 264; 1 Roper, H. & W. 401. For the circumstances under which the doctrine of estoppel is applied to the widow, see post, ch. xi.

³ 1 Roper, H. & W. 401-2.

⁴ Ante, § 4, and note.

⁵ Co. Litt. 34 b.

tion of her title to dower.¹ But when an assignment is made to her of lands in which she is dowable, in lieu of dower, she acquires an estate of freehold in her third part by the assignment without livery of seizin, although the assignment be against common right. It is, however, presumed, that if the assignment in the above case had been made by deed under the Statute of Uses, it would have been good, since the widow would have had a freehold in the lands for her life, and which lands she would have held as tenant in dower.”²

29. “So, also,” the same author continues,³ “a rent assigned without a deed in lieu of dower out of lands in which the widow is not dowable, is under the same circumstances as the last case. The assignment, therefore, can not be supported at law, although it be accepted by her, because the law does not allow a rent, which lies in grant to pass otherwise than by deed; so that such an assignment as above of a rent in lieu of dower out of lands not subject to that right, passes no interest in it to the widow; and, on the other hand, since dower is a title created by law out of particular estates and interests, it allows the widow to accept a rent out of the same estates by mere assignment without deed; yet in that case, unless the rent assigned be commensurate with the widow’s life, her acceptance of the assignment of it will not at law make it good. Thus, if the rent be granted for years only, or *pur autre vie*, the assignment will be void.”⁴

30. Upon the same subject Mr. Jacob remarks:⁵ “See Co. Litt.,⁶ where it is said, that if the heir assigns dower of lands of which the husband was seized, but the wife not dowable, she is tenant in dower. However, in the first resolution in Vernon’s case,⁷ it was expressly decided, that if, after the death of the husband, the heir makes an estate to the wife for life of any land (whereof she is not dowable)

¹ Vernon’s case, 4 Rep. 1; Perk. §§ 407, 410. In deciding the case of Conant v. Little, 1 Pick. 189, the court say: ‘The widow does not hold her estate of the heir, but of her deceased husband, or rather by appointment of law. If she received land that was not her husband’s, or other thing in lieu of dower, a deed would be necessary, because she would derive her title from the person making such conveyance in lieu of dower.’

² See Hargr. Co. Litt. 34 b. n. (9), that if the heir assign dower of lands of which the husband was seized, but the wife was not dowable, she is tenant in dower. *See qu.* Park, Dow. 264, note.

³ 1 Roper, H. & W. 402–3

⁵ 1 Roper, H. & W. 402, note.

⁷ Vernon’s case, 4 Co. 1.

⁴ And. 288; Hob. 153; Co. Litt. 34 b.

⁶ Co. Litt. 34 b. n. (9).

in full satisfaction of her dower, that is no bar of dower. This was on the supposition that the estate given in lieu of dower was effectually conveyed to her, and it proceeded on the principle that a right to an estate of freehold could not be barred by acceptance of any collateral recompense.¹ And it was on the same principle that a jointure was at common law no bar of dower, but the widow might accept the jointure and also claim dower out of the other lands of her husband.² It seems, therefore, that a grant of other lands, or of a rent out of other lands, or of any other collateral satisfaction, made by the heir to the widow in lieu of dower, and accepted by her, can not be pleaded at law in bar to a writ of dower. But if such grant be accompanied by a release of her dower, or a confirmation, or anything tantamount to it, it will be a bar to her dower claim.³ And thus it was said in the same case, that acceptance of dower by deed indented would conclude her."⁴

31. The validity of an assignment contrary to common right, where it is agreed to by the parties, has been recognized in several American cases. Thus, in *Jones v. Brewer*,⁵ the whole of one parcel of the husband's land had been, by agreement under seal, assigned to the widow for her life, in full satisfaction of her dower; and the transaction was sustained by the court. So an agreement between the widow and the tenant, that he should allow her a yearly sum instead of having dower assigned to her according to law, was acted upon by the chancellor, in *Hale v. James*.⁶ In Maryland, a widow may, by agreement with the tenant, suffer him to rent out the land, with the understanding that she shall receive her proportion of the rent in lieu of dower; and if the tenant receive the rent, and withhold from the widow her share, she may recover against him in assumpsit.⁷ In Missouri, the widow and heirs may, by agreement, and without any formal election by her, determine the kind and quantity of estate she shall take as dower.⁸ And the rule of the common law in this particular appears to be regarded as in force in Maine.⁹

¹ See to the same effect, Co. Litt. 34 b.; *Turney v. Sturges*, Dyer, 91 a.

² 4 Co. 2; post, ch. xv.

³ 4 Co. 1.

⁴ As to the effect of a collateral satisfaction for dower in equity, see post, ch. xi., §§ 1-15.

⁵ *Jones v. Brewer*, 1 Pick. 314.

⁶ *Hale v. James*, 6 John. Ch. 258.

⁷ *Marshall v. McPherson*, 8 Gill & J. 333.

⁸ *Welch v. Anderson*, 28 Misso. 293.

⁹ *French v. Pratt*, 27 Maine, 381; *French v. Peters*, 33 Maine, 396.

32. Upon the same principle, if the parties agree that dower shall be assigned by a court which does not possess jurisdiction in the particular case, and the assignment is made accordingly, and is accepted by the widow, it will be binding. Thus, in New Hampshire, the statute withholds from probate judges power to assign dower where the husband has mortgaged his estate; but in a case of that character, the mortgagee and the widow of the mortgagor nevertheless agreed that she should take her dower by assignment of commissioners to be appointed by a probate judge. An assignment made in pursuance of this agreement was held valid.¹ So in Massachusetts, where, under a similar statute, an assignment of dower in a mortgaged estate had been made by a probate judge, the heir consenting thereto in writing, and the mortgagee making no objection, the assignment was sustained as against the heir; and the fact that the interest of the mortgagee had been assigned to him was held to make no difference in the result.²

33. It is settled, also, that an irregular or void assignment of dower may become obligatory if the parties subsequently adopt and ratify the proceedings, or acquiesce therein for a long period of time. This has been determined in New York,³ Virginia,⁴ Kentucky,⁵ and Alabama;⁶ and the doctrine applies even where the court in which the proceedings were had has exceeded its jurisdiction or authority in making the assignment.⁷ In a case in Maine, where dower had been assigned by metes and bounds by commissioners appointed by the judge of probate, who made no return of their proceedings, the assignment was regarded as ineffectual; but the widow having entered into possession of the premises thus assigned, and held the same without objection on the part of the heirs, (some of whom were minors at the time), for more than twenty years, the court decided the inference to be legitimate that the dower was assigned with their assent; and, no complaint being made that the

¹ *Pinkham v. Gear*, 3 N. H. 163. See, also, *Meserve v. Meserve*, 19 N. H. 240, and *Beers v. Strong*, Kirby, (Conn.) 19.

² *Draper v. Baker*, 12 Cush. 288.

³ *Fowler v. Griffin*, 3 Sandf. S. C. 385.

⁴ *Fitzhugh v. Foote*, 3 Call, 13.

⁵ *Robinson v. Miller*, 1 B. Mon. 88; s. c. 2 B. Mon. 284; *Mitchell v. Miller*, 6 Dana, 79.

⁶ *Johnson v. Neil*, 4 Ala. 166.

⁷ *Fowler v. Griffin*, 3 Sand. S. C. 385; *Mitchell v. Miller*, 6 Dana, 79; *Robinson v. Miller*, 1 B. Mon. 88; s. c. 2 B. Mon. 284.

assignment was inequitable, the court further determined that there was no rule of law which required that it should be disturbed.¹

34. It is said that if a widow having a title of dower marry a second husband, and the issue of the first husband assign the third part of the lands to his mother by the agreement of the husband, for her dower, in allowance of all the freehold which his father was seized of, she may, after the death of the second husband, refuse it, and be endowed anew according to the value of the whole land which was in the possession of the husband during the coverture.² But it would have been otherwise if she had been endowed by the sheriff upon writ of dower brought by her and her husband.³

35. An assignment against common right, though made by the heir, is not binding upon persons having charges or other interests in the land, although created subsequently to the attachment of the title of dower. And if a tenant in tail assign an *undivided* third part of the lands in dower, it is good only during the continuance of his interest.⁴

Crops.

36. If lands which have been sown with corn and grain be assigned to the widow for dower by the heir, she will be entitled to the crops.⁵

Estoppel arising from the assignment of dower.

37. If the owner of real estate assign dower therein to a widow, he will not be permitted to deny that the land was subject to the right of dower, and this whether the assignment be in writing or by parol.⁶ So a parol assignment by a residuary devisee is conclusive of the right of dower as against him and his privies.⁷ And it is held in Tennessee, that the acceptance of dower by the widow, estops her from denying the title of her husband to the lands of which she was endowed.⁸

¹ Austin v. Austin, 50 Maine, 74.

² Perk. § 422; 2 Inst. 309; Jenk. Cent. 2, Ca. 56.

³ Ibid.

⁴ Park, Dow. 267. See Rowe v. Power, 4 Bos. & P. N. R. 11. But it has been said that if a tenant in tail assign a *rent* out of the land in lieu of dower, this shall bind his issue, unless it amount to more than a third part. Per two judges in Bickley v. Bickley, 1 And. 288.

⁵ Dyer, 316, pl. 2; Perk. § 521; 2 Inst. 81; 1 Bright, H. & W. 386, pl. 90; post, ch. xxx., §§ 15-20.

⁶ Shattuck v. Gragg, 23 Pick. 88.

⁷ Meserve v. Meserve, 19 N. H. 240.

⁸ Perry v. Calhoun, 8 Humph. 551.

CHAPTER V.

PROCEEDINGS AT COMMON LAW FOR THE RECOVERY OF DOWER.

§ 1, 2. Writ of dower <i>unde nihil habet</i> and writ of right of dower.	13. The count.
3. Against whom the writ will lie.	14. The view.
4. The precipe.	15-17. Pleas in abatement.
5. The writ of dower <i>unde nihil habet</i> .	18-48. Pleas in bar.
6-9. The summons.	49. Parol not allowed to demur.
10, 11. Essoin.	50. The trial.
12. Grand cape.	51-57. The judgment.

Writ of dower unde nihil habet and writ of right of dower.

1. THE legal remedy at common law to enforce an assignment of dower, is by a writ of dower *unde nihil habet*, or by a *writ of right of dower*, brought against the tenant of the freehold; upon which, if the demandant obtain judgment, dower is assigned by the sheriff on the land; and she may then proceed to recover possession by ejectment.¹ The process in these actions is still retained in England.²

2. The writ uniformly adopted when circumstances will allow of it is the writ of dower *unde nihil habet*, which is a writ of right in its nature, and may be resorted to in every case where no dower has been already assigned by the tenant to the writ within the vill where the lands lie of which dower is demanded; but if the widow has received part of her dower of the tenant himself, in the same vill, the proper remedy is the *writ of right of dower*, which is a more general writ, extending either to a part or to the whole; and is, with respect to the claim of dower, of the same nature and efficacy as the grand writ of right respecting a claim to an estate in fee simple.³

¹ Park, Dow. 283; 1 Roper, H. & W. 429.

² See 3 & 4 Will. IV. ch. 27, § 36; 1 Bright, H. & W. 398, pl. 2; and p. 404, pl. 21, note.

³ Gilb. Dow. 374, 367; Fitzh. N. B. 18 (C.); Kel. 128; Booth, Real Act. 166, 118; Stat. Westm. 1, ch. 49; 2 Inst. 261; Park, Dow. 283. See 1 Roper, H. & W. 434.

Against whom the writ of dower will lie.

3. The writ of dower lies only against the tenant of the freehold, and who ought to have assigned dower to the widow without compulsion.¹ It can not be brought against the guardian in socage,² nor against any person who has but a chattel interest, as a tenant by elegit, or a tenant for years.³ And it seems that although judgment and execution be had against such a tenant, yet he may afterwards enter upon the demandant.⁴ And the tenant of the freehold, upon his application before judgment, where the action is brought against a party having a mere chattel interest, may be received to defend. If he neglect to make application he may nevertheless falsify after judgment.⁵ So the reversioner may be received to protect his title where the writ is brought against the tenant for life.⁶

The precipe for a writ of dower.

4. In the precipe for this writ, when the widow is first named she ought to be described as having been the *wife* of her late husband. In a case in which this was omitted in the writ, and the sheriff was ordered by it to command the tenant "to render to C. her reasonable dower out of the freehold which was of D. late her husband," the court abated the writ, because in the beginning of it C. was not mentioned to have been the wife of D., which was the very character in and upon which C.'s title to dower was founded.⁷

The writ of dower unde nihil habet.

5. Upon the filing of the precipe a writ of dower *unde nihil habet* issues to the sheriff.⁸ The process thereon is by summons to appear,

¹ Park, Dow. 265, 285; 1 Roper, H. & W. 429; 2 Saund. 43, note.

² 29 Ass. 68; Bro. Dow. pl. 63.

³ 9 Co. 17 a.

⁴ Mitchell v. Hyde, 1 Leon. 92.

⁵ Anon. Brownl. & Goldsb. 126.

⁶ Ibid.; Park, Dow. 285.

⁷ Fulliam v. Harris, Cro. Jac. 217; 1 Roper, H. & W. 429; 2 Saund. 43, note. The following is the form of the precipe: Staffordshire, to-wit: Command A. B. that justly, and without delay he render to C. D., widow, who was the wife of J. D. her reasonable dower, which falleth to her out of the freehold which was of the said J. D., late her husband, in the parish of E. [or, parishes of E., F. and G.] whereof she has nothing, as she says. Returnable, &c. 2 Saund. 43, note; 3 Chitty's Pl. 10 Amer. ed. 1311.

⁸ *Form of the writ*: William the Fourth, by the grace of God, of the United King-

and if the tenant neglect to appear, or do not cast an *essoins*, then by *grand cape* and *petit cape* in the common pleas.¹

The summons.

6. After the writ has issued the next proceeding is a summons to the tenant to render the dower, which must be served upon the land.² The demandant is not bound to give the tenant actual notice of the summons.³ It may be either served upon the tenant personally, or left at his place of abode on the lands demanded by the writ. In the latter case it is usual to set up a white stick or wand upon the premises.⁴

7. In order, however, that convenient notice may be given to the tenant of the freehold, the summons is required by the Act of Elizabeth,⁵ to be proclaimed fourteen days at least before its return, upon a Sunday, immediately after divine service and a sermon, if any, or immediately after divine service, at or near the more usual door of the church or chapel of the town or parish where the lands are situated upon which the summons was made. The statute further requires the proclamation to be returned with the names of the summoners, and it declares that until a summons shall have been so proclaimed, no *grand cape* shall issue, but summons after summons till one duly proclaimed shall have been made and returned.⁶ By a subsequent statute, all proclamations or notices

dom of Great Britain and Ireland, king, defender of the Faith, to the Sheriff of [Essex,] Greeting: Command C. D. that justly and without delay he render to A. B., widow, who was the wife of E. B., now deceased, her reasonable dower which falleth to her of the freehold which was of the said E. B. her late husband, in the parish of E. [or, parishes of E, F. and G.] whereof she has nothing, as she says, and whereof she complains that the said C. D. deforceth her, and unless he shall so do, and if the said A. B. shall give you security to prosecute her claim, then summon by good summoners the said C. D., that he be before our justices of the Bench, at Westminster, on &c. [a general return day,] to show wherefore he hath not done it, and have there the summoners, and this writ. Witness ourself at Westminster, the day of in the year of our reign. Pledges to prosecute, John Doe and Richard Roe. Summoners, John Venn and Richard Fenn. John Herbert, Esq., Sheriff. 3 Chitty's Pl., 10 Amer. ed. 1311; 2 Saund. 43. For the form of the writ where the widow has married again, see 3 Chitty's Pl., 10 Amer. ed. 1312; Booth, 166. See, also, Fitzh. N. B. 147, (E.); Rast. Ent. 227 b.; Reg. 170 a.; Gilb. Dow. 375.

¹ Fitzh. N. B. 148, (D.); 2 Saund. 43, note.

² Allen v. Walter, Hob. 133.

³ 3 Chitty's Pl. 1312, note.

⁶ 1 Roper, H. & W. 430; 2 Saund. 43, note.

⁵ 2 Inst. 253; 2 Saund. 43, note.

⁶ 31 Eliz. c. 3, § 2.

which had been previously required to be made or given in churches or chapels during or after divine service, are to be put in writing, or printed, and instead of being proclaimed in churches are to be affixed, before divine service, on the days on which they have been heretofore made, on or near the doors of the churches.¹

8. As the Act of Elizabeth requires the proclamation to be made at the door of the parish church, it has been held that this must be literally complied with, although the church or chapel be not in the county where the lands lie.² But if the lands be situate in different parishes or townships, the proclamation of the summons at the door of one church or chapel where part only of the lands lie has been held to be sufficient.³

9. The sheriff, upon the receipt of the writ of dower makes his warrant in the form given in the note.⁴ Thereupon the summons⁵ is issued and served in the manner before stated. This having been done the sheriff makes return of the writ and of the proceedings had thereunder.⁶ A return that he had proclaimed "the contents of the writ," is insufficient, because he must proclaim that he made summons on the land. But according to the modern practice,

¹ 7 Will. IV. and 1 Vic. ch. 45, § 2; 1 Bright, H. & W. 399, pl. 6.

² Cro. Eliz. 472; 2 Saund. 43 a., note.

³ Harrison v. Massam, Noy, 22; Allen v. Walter, Hob. 133: 1 Roper, H. & W. 430.

⁴ J. W., Esquire, Sheriff of [Essex,] to E. N. and O. P., my bailiffs for this time only, Greeting: By virtue of a writ of dower of our lord the king *unde nihil habet*, to me directed, I command you that you command C. D. that justly and without delay he render to A. B., who was the wife of E. B., her reasonable dower, which, &c. (*as in the writ*), deforceth her; and unless he shall do it, then summon the said C. D. that he be before our justices at Westminster on _____, to show wherefore he will not do it, and that after the said summons is made you do, at the most usual door of the parish church of the parish of E., on Sunday next after the said summons, immediately after divine service is ended, proclaim the same summons according to the form of the statute in such case made and provided. Given under the seal of my office, &c. 3 Chitty's Pl. 10 Amer. ed. 1312; 2 Saund. 43 a., note.

⁵ *Form of the summons*: By virtue of his majesty's writ of dower *unde nihil habet*, to the Sheriff of [Essex] directed, and by virtue of the said sheriff's warrant to us directed, we do hereby require and command you that you render to A. B., &c. (*as in the writ*), as she alleges and complains, that you the said C. D. keep her out of the same, and if you refuse so to do, then we do hereby summon you that you be and appear before his majesty's justices, at Westminster, on _____, to show cause why you do not. 3 Chitty's Pl. 1313; 2 Saund. 43 a., note; 2 Sel. Prac. 2 ed. 203; 1 Taunt. 415.

⁶ For the form of the return, see 3 Chitty's Pl. 1313; 2 Saund. 43 a., note; Furnis v. Waterhouse, 1 Mod. 197.

it seems sufficient to return "that the sheriff made proclamation of the said summons according to the form of the statute."¹

Essoin.

10. The writ and proceedings thereunder being returned, the tenant may cast an *essoin*, *i. e.* an excuse for his non-appearance at the return of the writ;² this is a dilatory proceeding, and therefore discountenanced. The *essoin* will be of no avail if he be seen in court, or if the entry of it with the clerk of the *essoins* appear to have been made for him by an attorney;³ and if the *essoin* be not cast at the proper time, the demandant may enter a *ne recipiatur*.⁴

11. The *essoin* being legally cast, then, in order to prevent the tenant from signing a *non pros* after the service of a rule by him of his intention to do so, the demandant should adjourn the *essoin*, which, by statute in England,⁵ is the fourth return next after that of the writ of dower, both inclusive.⁶

Grand cape.

12. The next proceeding, in default of the tenant's appearance, is the issuing of the *grand cape* by the demandant, a term borrowed from the word *cape* in the beginning of the writ. It directs the sheriff to take into his possession, by the view of an inquest, a third of the lands, for the tenant's default, and then to summon the tenant to appear in court at Westminster to account for his prior non-appearance.⁷ If the sheriff make no return to that writ, then

¹ *Allen v. Walter*, Hob. 133; 2 Saund. 43 b., note.

² As to *essoins*, see *Twynning v. Lowndes*, 10 Bing. 65; 3 Moo. & S. 443; *Price v. Hughes*, 1 Dowl. P. C. 448; 9 Co. 16; Com. Dig. Pleader, (2 Y. 1.)

³ *Anson v. Jefferson*, 2 Wils. 164.

⁴ 2 Saund. 43 b., note.

⁵ 24 Geo. II. c. 48, § 3.

⁶ 1 Roper, H. & W. 431; 2 Saund. 43 b., note. As to the return days, see 1 Will. IV. c. 3, § 2.

⁷ *Form of the grand cape*: William the Fourth, &c., take into our hand by the view of good and lawful men of your county, the third part of [two messuages, one hundred acres of land, ten acres of meadow, and five acres of wood, with the appurtenances,] in the parish of E. in your county, which A. B. in our court, before our justices at Westminster, claims as the dower of her the said A. B. of the endowment of E. B., her late husband, against C. D. by our writ of dower *unde nihil habet*, for the default of him the said C. D., and the day of the taking thereof make known

an *alias grand cape* issues;¹ and should the tenant still neglect to appear, the demandant is strictly entitled to judgment of seizin, and to an award of a writ of inquiry of damages.² The demandant, however, may waive her advantage, and accept an appearance of the tenant upon the *grand cape*.³ And this leads to a consideration of the proceedings in a writ of dower when there is no default of appearance in the tenant.

'The count.

13. We shall suppose, then, the tenant to appear at the return of the writ of dower. The demandant must afterwards count or declare,⁴

to our justices at Westminster, by your letters under seal, and summon by good summoners the said C. D. that he be before our justices at Westminster, on , to answer and show wherefore he was not before our justices at Westminster, on , according as he was summoned, [but when the default is for not *appearing on the adjournment day of the essoin*, then say, "wherefore he did not keep the day given him by reason of his essoin,"] before our justices at Westminster, on last passed, and have there the names of those, by whose view you should do this, and this writ. Witness, &c. 3 Chitty's Pl. 10 Amer. ed. 1314; 2 Saund. 43 b., note.

The form of the sheriff's return thereon is given in 3 Chitty's Pl. 1315, and in 2 Saund. 43 c., note.

¹ The form of the entry of the *grand cape* and *alias*, when the tenant makes default at the return of the summons, is in Rast. Ent. 239 a., pl. 4.

² 2 Saund. 43 c., note; 1 Roper, H. & W. 431; Park, Dow. 286.

³ 2 Saund. 43 c., note; 1 Roper, H. & W. 431; Park, Dow. 286; Staple v. Hayden, 1 Salk. 216, 217; s. c. 6 Mod. 4. The distinction between *grand* and *petit capes* is this: the former never lies after an appearance by the tenant in chief; the latter issues after the tenant has appeared, and makes default, in any term *subsequent* to his appearance. Thus, if the tenant appear to the summons, and the plaintiff make her demand, and in the *same term* in which the tenant appeared he make default, or *nihil dicit*, the plaintiff ought to have peremptory judgment of seizin, and no *grand* or *petit cape* is proper to be issued after such default. 1 Roper, H. & W. 433; 2 Saund. 45, note. There seems to be no difference in the form of a *grand* or *petit cape*, except that the words "and the day," &c., are omitted in the latter. 2 Saund. 45, note.

⁴ *Form of the count*: Essex, (to-wit,) A. B., widow, who was the wife of E. B., Esquire, deceased, by —, her attorney, demands against C. D. the third part of [ten messuages, ten barns, ten stables, four gardens, four orchards, one water corn mill, two thousand acres of land, two hundred acres of meadow, two thousand acres of pasture, two thousand acres of manor, and two hundred acres of woodland,] with the appurtenances, in the parish of , in the county of Essex, as the dower of the said A. B. of the endowment of the said E. B., deceased, heretofore her husband, whereof she hath nothing, &c. 3 Chitty's Pl. 1315–16; 2 Saund. 44, 329.

For the form of the count where there has been a second marriage, or by an infant, see the same authorities.

by which she ought to demand a third part of the whole of what she is dowable.¹

View.

14. The count being filed, if the tenant claimed the lands under the alienation of the husband, he was entitled, as it would seem, to pray a view, in case such proceeding was really necessary, as if he were ignorant of the particular lands in his possession which were liable to the widow's demand, otherwise not; for if it appeared that he was acquainted with that circumstance, then the court would not accede to his prayer of a view, the request being merely for delay, which is not allowable in such an action.² But the statute of Westminster 2,³ proceeding on the above distinction, deprives him of a view by declaring that "in a writ of dower where the dower in demand is of land which the husband aliened to the tenant or his ancestors, where the tenant ought not to be ignorant what land the husband did alien to him or his ancestors, although the husband died not seized, yet from henceforth view shall not be granted to the tenant." The alienee of the husband being thus excluded from a view,⁴ and the heir of the husband who died seized of the lands being equally excluded at common law, because the legal presumption is, that he was acquainted with the estate which descended to him upon his ancestor's death,⁵ a case can scarcely happen of a tenant in dower being entitled to a view. If, however, he should pray one, where he is not entitled to have it, the demandant must defeat it by what is called a counter plea, upon which issue may be taken, or to which the tenant may demur; and if he adopt the latter mode, and judgment be given against him, it will be peremptory; but if the decision be in his favor, and a view granted, he will be entitled to an essoin similar to that before mentioned,⁶ and the demandant must count *de novo* after the return of the view, or of the adjournment of the essoin; which being done, the tenant may plead either in abatement of the writ, or in bar of the action.⁷

¹ 3 Levinz, 169.

² Upon this subject, see the cases of *Astmal v. Astmal*, 2 Lev. 117; *Davis v. Lees*, Willes' Rep 344-347; *Herbert v. Vernon*, Dyer, 179 a., pl. 41; *Whelpdale v. Whelpdale*, 3 Lev. 169.

³ 13 Edw. I. c. 48.

⁴ *Bernes v. Rich*, 3 Lev. 220.

⁵ 2 Inst. 481.

⁶ Ante, §§ 10, 11.

⁷ 1 Roper, H. & W. 431-3; 2 Saund. 44, note.

Pleas in abatement.

15. To the writ of dower *unde nihil habet*, the defendant may plead in abatement *non tenure*, either of the whole or of a part;¹ or that he holds jointly with A. not named.² But in these cases, as the writ of dower *unde nihil habet* is a writ *de libero tenemento*, generally, and not, like a *precipe quod reddat*, a demand of a certain number of acres, if the plea is only to a part, the demandant may abridge or narrow her demand to the residue,³ and the writ will remain good, for the abridgment does not falsify it, as it would the *precipe quod reddat*.⁴ This right of the widow to abridge her demand may be exercised even though the tenant do not plead in abatement.⁵ But it is said that if the writ is *de libero tenemento* in D. and S. there can be no abridgment as to *all* the lands in either of the vills named.⁶

16. It is to be remarked, however, that the plea of *non tenure* either of the whole or of a part, though usually called a plea in abatement, concluding with praying judgment of the writ, is not strictly a plea in abatement, though dilatory in its nature; for so far from giving the demandant a better writ, the plea is that the tenant is not liable to the action, inasmuch as he does not hold the land in any shape; and besides, it is frequently pleaded as to part along with a plea in bar to the rest.⁷

17. The defendant may also plead in abatement ancient demesne,⁸ or that the demandant married pending the writ.⁹

Pleas in bar.

18. In this action pleas in bar are either such as deny the right of the demandant to any dower at all, or such as admit her title, but allege some reason why she should not be permitted to recover. The former will be first noticed.

¹ Rast. Ent. 231 a. b, 232 b.; 1 Bro. Ent. 265; Clift. 303, pl. 11; Rob. Ent. 246; 1 Lutw. 716, 717. And see *Mitchell v. Hyde* 1 Leon. 92; Moor, 80; Dal. 100; 2 Saund. 44 a., note; 3 Chitty's Pl. 10 Amer. ed. 1319-20.

² Rast. Ent. 225 b.

³ Lev. Ent. 76; 3 Lev. 68; Herne, 342.

⁴ 14 H. VI. 3, 4; Bro. Abr. pl. 12; 2 Saund. 44 a., note.

⁵ See 2 Saund. 44 a., 330, 339.

⁶ 3 Lev. 68.

⁷ 2 Saund 44 a., note. See the form of this plea in Rast. Ent. 231 a. b., 232 b. See, also, 3 Chitty's Pl. 10 Amer. ed. 1319-20.

⁸ 1 Roll. Abr. 322, (E.) pl. 2; Rob. Ent. 250.

⁹ Co. Ent. 173 b.; 2 Saund. 44 a., note; Park, Dow. 287-8.

19. (1) *Ne unques seisiè que dower*. This plea alleges that the demandant's husband was never seized of such an estate in the lands as entitles her to be endowed of them.¹

20. (2) *Ne unques accouplè in loyal matrimoniè*. By this plea the tenant controverts the validity of the demandant's marriage with the person of whose lands she claims dower.² The demandant must reply that she was married at B. in such a diocese,³ and a writ is thereupon sent to the bishop of that diocese requiring him to certify the fact to the court.⁴ And if the court in which a demand of dower is made is an inferior jurisdiction, which can not write to the bishop, as if the action be brought in the Husting's Court of London, or any other corporation, the record must be removed to have it tried, to a superior court which can write to the bishop; and upon return of the bishop's certificate the record is to be remanded, as in a foreign voucher.⁵

21. But if the marriage were celebrated in Scotland where there is no episcopal establishment, or in a foreign country, and consequently out of the jurisdiction of the temporal courts of the kingdom, in such case the legality of the marriage must of necessity be tried by a jury.⁶ "If," said the court in *Ilderton v. Ilderton*,⁷ "the trial can not be by certificate, we lay it down as a proposition fundamental and incontrovertible, that the trial is to be by the country; and for a reason that is unanswerable, that there may not be a failure of justice."⁸

¹ For the form of this plea see 3 Chitty's Pl. 1316. See, also, 2 Saund. 44 b. and 229; Rast. Ent. 230 a.; Co. Ent. 176 a. As to the necessity of pleading the special matter where there has been a remitter, see Park, Dow. 145, 154. As to the seizin and estate requisite to support a claim of dower, see vol. i., chapters xi. and xii.

² The form of this plea will be found in 3 Chitty's Pl. 1317; 2 Saund. 44 b., note. See 2 H. Bl. 145. The plea *ne unques accouplè* can not be joined with the plea *ne unques seisiè que dower*. *Anderson v. Anderson*, 2 W. Bl. 1157; *Hillier v. Fletcher*, Ibid. 1207.

³ See 3 Chitty's Pl. 1317, for the form of the replication that the parties were lawfully married in England; and 2 H. Bl. 149, for the form of the record where this plea is interposed.

⁴ Co. Ent. 180 a., 181 a.; Dy. 313 b., 368 b.; 1 Leon. 53, 54; Rast. Ent. 228 b.; *Robins v. Crutchley*, 2 Wils. 122, 125, 127; 2 Jones, 38. As to what shall be a good certificate by the bishop, and that he must return the fact, and not the evidence, see 2 Roll. 591, 592; Dy. 305 b., 306 b., 313, 368-9; *Wickham v. Enfield*, Cro. Car. 351; 2 Saund. 44 b., note; 1 Bright, H. & W. 402, pl. 16.

⁵ *Booth*, Real. Act. 167; Co. Litt. 134 a.; Co. Ent. 180 b.

⁶ For the form of a replication that the parties were lawfully married in Scotland, see 3 Chitty's Pl. 1318. See, also, Rast. Ent. 228; Co. Ent. 180.

⁷ *Ilderton v. Ilderton*, 2 H. Bl. 145, 159.

⁸ 1 Bright, H. & W. 402, pl. 16.

22. But in any other case than that of a marriage in Scotland, or in some foreign country, it seems that a replication to the plea of *ne unques accouplè* concluding to the country, is bad, for it goes to oust the bishop of his jurisdiction.¹ Neither can the demandant reply a sentence in the ecclesiastical court declaring the marriage valid, for that is only matter of evidence, and no estoppel; and the bishop is the proper judge whether, as evidence, it is conclusive upon him.² But if the bishop has already certified the marriage to the court, that certificate may be replied by the demandant, and shall be a good estoppel to all the world, for to award a second writ to the bishop would be to try the matter twice.³

23. It follows from what has been already observed, that the tenant can not plead bigamy as a bar to the demand, but must avail himself of it on the general issue of *ne unques accouplè*.⁴

24. The proper place to produce all evidence tending to invalidate or substantiate the marriage, will be in the bishop's court, when the writ from the temporal court arrives there.⁵

25. (3) The tenant may also plead that the demandant eloped from her husband during the coverture, and lived with another person in adultery.⁶ To which the demandant replies either that she did not elope,⁷ or that she was afterwards reconciled to her husband.⁸

26. (4) The tenant may also plead a divorce *à vinculo matrimonii*.⁹

27. (5) Or he may plead a jointure made by the demandant's husband on her before marriage;¹⁰ or that it was made after marriage, and the wife agreed to it after her husband's death.¹¹ To which the demandant may reply that the estate was not made to such uses, or that it was not for a jointure.¹²

¹ Robins v. Crutchley, 2 Wils. 128.

² Ibid. 122, 127.

³ Ibid. 128, 129; Bro. Estoppel, pl. 68; Fitzh. Abr. Estoppel, pl. 282.

⁴ Bro. Dow. pl. 54, cites 39 Edw. III. 15.

⁵ See Bro. Certificate d' Evesque, pl. 12; Dav. 53 a. b. For an account of the inquisition and proceedings before the bishop, see Park, Dow. 290; Hughes, 993.

⁶ See 3 Chitty's Pl. 1318; Rast. Ent. 230 a.; Rob. Ent. 260; 2 Saund. 44 c., notes, and the form in 6 Bing. 135. See, also, post, ch. xviii.

⁷ See 3 Chitty's Pl. 1319; Rast. Ent. 230 a.; 2 Bro. Ent. 109; 2 Saund. 44 c., note.

⁸ Dy. 107 a.; 1 Bro. Ent. 204; Co. Litt. 32 b.; 2 Saund. 44 c., note.

⁹ Co. Litt. 32 a.; 2 Saund. 44 c., note. See post, ch. xix.

¹⁰ Co. Ent. 172 a. b.; Hob. 71, 104.

¹¹ Co. Ent. 171 b., 172 a.; Rob. Ent. 261; 2 Saund. 44 c., note. See post, ch. xv.

¹² Co. Ent. 172 a. b.

28. (6) So the tenant may plead that the husband levied a fine, and the demandant made no claim within five years after his death.¹ To which she may say that she brought her action of dower within five years.²

29. (7) Or the tenant may plead that the demandant's husband made a feoffment of the lands to him, and was afterwards attainted of treason.³ And a replication that her husband was pardoned, will not, it seems, be any answer, for reasons which have been already adverted to.⁴

30. (8) Or the tenant may plead that the demandant and her husband levied a fine, or suffered a common recovery of the lands.⁵

31. (9) Or that the husband of the demandant is alive.⁶ To which plea the demandant replies that her husband is dead, and thereon a day is given for proof of his death, which must be made in court by two witnesses at least.⁷ And at the same day the tenant may examine his witnesses that the husband is alive.⁸ And if it appear to the court by witnesses that the husband is dead, the demandant is entitled to immediate judgment.⁹ So if the proof be not direct, if there is no proof of his being alive.¹⁰

32. (10) The tenant may plead that he assigned a rent of so much per annum to the demandant in recompense of her dower. But he must show what estate he had in the land at the time of granting the rent, so that it may appear to the court that he had power to grant it; and if he omit to do this the demandant may demur.¹¹

33. (11) The tenant may plead that the demandant is seized of a third part of the land demanded already; but he must show who assigned it, or that she recovered it; for if she were in by disseizin she must have dower of the remaining two parts, nevertheless.¹²

¹ Co. Ent. 171 a.; Clift. 305; Dal. 107.

² Co. Ent. 171 b.

³ 2 Hawk. Pl. Cor. c. 49.

⁴ Vol. i., ch. xxix., §§ 47, 48. See post, ch. xxxi., §§ 1-4.

⁵ Rob. Ent. 237; 2 Saund. 44 c., note. See post, ch. xii.

⁶ 1 Bro. Ent. 205; Bendl. pl. 131; 1 And. 20; Com. Dig. Pleader, (2 Y. 9.)

⁷ Bendl. pl. 131; Dyer, 185 a. ⁸ Ibid.; Moor, 14.

⁹ Bendl. pl. 131.

¹⁰ 1 And. 20; Moor, 14; Park, Dow. 247, 293. See post, ch. ix., §§ 35-56.

¹¹ Beaumont v. Dean, 2 Leon. 10; Moor, 59; Cro. Eliz. 451.

¹² 39 Edw. III. 17.

34. (12) He may plead that other lands were assigned for dower by the heir,¹ or by himself, he being the assignee of the husband.²

35. (13) Or that the demandant had released her dower to the tenant of the freehold.³

36. If the husband alien his estates in parcels to different persons, the widow recovers from each of them the third part of the lands conveyed to him.⁴ And if one of these persons has assigned her a portion of his lands in satisfaction of her whole dower, it seems that the others can not plead this assignment as a legal defence to writs of dower brought against them.⁵

37. The tenant can not plead a prior term of years *in bar* of the action, for it is no bar in dower; but he may plead it in delay of execution, and to save himself the damages if no rent was reserved upon the term; or if there was, praying that the demandant may be endowed of the reversion and the rent.⁶ And if the tenant do not plead such term he can not set it up afterwards as a prior title, to an ejectment brought by a tenant in dower, after her recovery, to obtain possession.⁷

38. Pleas which admit a right of dower, but allege some excuse or reason for not making an assignment, are as follows:

39. (1) *Detinue of charters*. This plea alleges that the demandant detains the deeds and evidences of title belonging to the estate, and that the tenant was always ready to assign her dower if she would deliver them; consequently it can not be pleaded after imparlance.⁸ No person but the heir can plead this plea, for it lies only in privy.⁹ And if he plead it he must show the certainty of the charters, so that a certain issue may be joined, or that they are in a chest or box locked or sealed.¹⁰ And if the heir delivered the charters to the wife, he can not plead *detinue*, for she has them by

¹ Moor, 26, 59; Co. Litt. 35 a. See Perk. § 409; Carter, 187.

² Com. Dig. Pleader, (2 Y. 15.) See ante, ch. iv.

³ Cro. Jac. 151. See post, ch. xii. ⁴ Perk. § 423. See post, ch. xxii., §§ 2-4.

⁵ Co. Litt. 35 a.; 1 Roper, H. & W. 437. And see Perk. § 402; post, ch. xxvii.

⁶ See Booth v. Lindsey, 2 Raym. 1294; Rob. Ent. 237; Anon. 2 Mod. 18; Villers v. Handley, 2 Wilson, 49; vol. i., ch. xviii., §§ 6, 7; post, §§ 56, 57.

⁷ Lindsey v. Lindsey, 1 Salk. 291; 2 Raym. 1294. See post, § 56.

⁸ Rast. Ent. 224 b., 229 b.; Bro. Dow. pl. 53; Moor, 81; Hob. 199; 9 Co. 18 a.; Dal. 100; Perk. § 356; Burdon v. Burdon, 1 Salk. 252. It is now held that an imparlance is not to be granted in dower. Foster v. Kirby, Barnes, 2.

⁹ 9 Co. 18 a.; Dy. 230 a.

¹⁰ 9 Co. 18 a., 110 a.; Plowd. 85 a. b.; Dy. 230 a.; 11 Hen. VIII. f. i.; Perk. § 356.

his own act.¹ And as the privity is the foundation of this plea, it shall not be pleaded even by the heir, if he has the land by purchase and not as heir.² Or if he be not immediately vouched, but only by the vouchee of the tenant.³ Or if he come in as vouchee having no lands in the county where the dower is demanded.⁴ Or if he come in as tenant by receipt.⁵

40. In two of these cases there would be an obvious absurdity in the plea, for it affirms that the tenant has been always ready, and yet is, to render dower, if the demandant would deliver to him his charters; and tenant by receipt, or vouchee over, can not render the demandant her dower, nor can she recover it against him.⁶ In these cases, therefore, the widow may recover her dower, although she persists in detaining the charters, but an action of detinue will lie against her for them.⁷

41. And if the heir's title to the deeds be not absolute, but liable to be defeated by the birth of a child, he can not plead detinue of charters, for the widow may keep them for the use of the child *in ventre sa mere*.⁸ It should be remarked, also, that this plea is not a bar for more lands than the charters concern.⁹ But one coparcener may have this plea after partition, though the evidences concern the other parcener and herself equally.¹⁰

42. If the demandant reply to this plea that she is ready to deliver the deeds to the tenant, and bring them into court, she will obtain an immediate judgment for her dower, because the plea admits her right to endowment upon condition of her yielding up the deeds;¹¹ but she will lose mesne profits, damages and costs, since it was her own fault, by improperly detaining the deeds, that her dower was not assigned.¹² It seems that if dower is brought against two, who plead detinue of charters, a delivery of the deeds to one of them by the demandant, although out of court, will be sufficient as to the other.¹³

¹ 9 Co. 18 b.

² 9 Co. 18 b.; Dy. 230 a.; Perk. § 356.

³ 9 Co. 18 b.; Dy. 230 a.; Perk. § 358.

⁴ 9 Co. 18 b.

⁵ 9 Co. 18 b.; Dy. 230 a.; Perk. § 358.

⁶ Park, Dow. 295. See 1 Roper, H. & W. 447, and note by Jacob; 9 Co. 18 b., 19 b.; Dy. 230 a.

⁷ Park, Dow. 296.

⁸ Bro. Dow. pl. 8; Perk. § 360.

⁹ Dy. 230 a.; Perk. § 357.

¹⁰ Bro. Dow. pl. 41; Perk. § 359.

¹¹ Rast. Ent. 224 b., 230 a.; Hob. 199; 9 Co. 18 b., 19 a.; 1 Salk. 252.

¹² Co. Litt. 32 b.

¹³ Fitzh. N. B. 138 n.; 2 Saund. 44 d., note.

43. The demandant may also reply that she does not detain the deeds,¹ but if this issue be found against her she loses her dower.²

44. (2) *Tout temps prist*. When the husband dies seized, his heir succeeds to his estate by legal right; so that his entry and enjoyment of it being under a lawful title, he does no wrong in retaining the possession of the whole until he be demanded by the widow to assign and deliver up to her a third part of it for her dower. Previously to such demand, the widow's title to damages under the statute of Merton, is defective, for it only gives them to such widows who can not obtain their dower *sine placito*, i. e. without suit, after a prior demand. Lord Coke, therefore, recommends the widow to demand her dower before good testimony as soon after her husband's death as she is able,³ in order to obviate all doubt as to her title to recover damages and costs.

45. If, however, the widow has made no demand of dower prior to the suing out of her writ of dower, the heir may plead *tout temps prist*, and pray that she may not have damages; and if the plea be true, the widow will lose the mesne profits and damages from the death of her husband to the commencement of the suit, from which latter period to the execution of the writ of inquiry, she will be entitled to them.⁴ But if she has demanded her dower, then she ought to reply to the plea, stating the fact, and putting the question in dispute in issue.⁵

46. But if the heir do not take advantage of the widow's neglect in demanding dower by a plea, he will lose the benefit of that circumstance;⁶ and in such event she will be entitled to mesne profits and damages from her husband's death, together with costs.⁷

47. A demand of endowment, without an express refusal on the part of the tenant, will be sufficient to entitle the widow to damages and costs.⁸

48. The alienee of the heir can not plead *tout temps prist*, because he was not in possession of the estate during all the period

¹ Rast. 224 b.; Moor, 81; 2 Saund. 44 d., note.

² Hob. 199; 1 Roper, H. & W. 446; Park, Dow. 227.

³ Co. Litt. 32 b.; 2 Saund. 44 d., note.

⁴ Barnes, 234; Bull. N. P. 117; 1 Rich. Prac. C. P. 509; 2 Saund. 44 d., note.

⁵ See Hargr. Co. Litt. 33 a. n. (1); 13 Edw. IV., f. 7; 1 Lutw. 717; 2 Saund. 44 d., note.

⁶ Dobson v. Dobson, Ca. temp. Hardw. 19; Kent v. Kent, 2 Stra. 971.

⁷ Buller's N. P. 117.

⁸ Corsellis v. Corsellis, Bull. N. P. 117.

which elapsed since the husband's death, and therefore had not the power of assigning dower at all times during that period.¹

The parol not allowed to demur.

49. In writs of dower the parol shall not demur for the non-age of the heir, because of the mischief that might ensue if the demandant, claiming only an estate for life, should die and lose the estate.² But it is said in the ancient law books, that if a feme, after the death of her husband, suffer one to continue a year and a day, and he die seized, his heir within age, the feme shall not have dower during the non-age of such heir, but the parol shall demur, because it was her folly that she did not bring suit.³

Trial of the issue.

50. If the marriage of the widow with her late husband be not disputed,⁴ and issue is joined upon a fact within the province of a jury, upon which the demandant's right to dower is denied, the question is to be settled by a jury in the usual manner; and in case the issue be found for the widow,⁵ she will obtain judgment for her dower, and a writ of seizin will be addressed to the sheriff to assign it.⁶

The judgment.

51. The judgment in this action, generally speaking, is to recover seizin of a third part of the tenements in demand in severalty by metes and bounds, and the mesne profits and damages.⁷ But if judgment be obtained against several tenants in common, it is error if it be said "in severalty by metes and bounds;" but it may be "in three parts to be divided."⁸

¹ Co. Litt. 33 a.; 2 Bac. Abr. 392; Park, Dow. 305; 1 Roper, H. & W. 444, 445. And see 1 Keb. 87. On the subject of damages, see further, post, ch. xxv.

² 1 Roll. Abr. 137; Smith v. Smith, Cro. Jac. 111; 3 Leon. 392; 3 Bulstr. 138; Gore v. Perdue, Cro. Eliz. 309; Herbert v. Binion, Cro. Jac. 392.

³ Fleta, 1, 6, c. 43; Bract. 252; Britt. c. 111, f. 47; Cro. Jac. 392; Park, Dow. 298.

⁴ See ante, §§ 20-24.

⁵ For the form of the verdict, see 3 Chitty's Pl. 1321; 2 Saund. 331.

⁶ 1 Roper, H. & W. 433.

⁷ See forms in 3 Chitty's Pl. 1323-1325; 2 Saund. 45, notes, 331, 332. See, also, Com. Dig. Pleader, (2 Y. 19.)

⁸ Glefold v. Carr, Brownl. & Goldsb. 127.

52. If the husband had aliened part of his lands with warranty, and left other lands in the same county which descended to the heir, the whole of the widow's dower was to be assigned to her out of the descended lands, if of sufficient value, in exoneration of the alienee;¹ hence, if the widow brought her writ of dower against the latter, and the heir being vouched, admitted the warranty, and that he had assets by descent in the same county, the widow had judgment for her dower against the heir, and the tenant held in peace.² If the lands were in different counties, the widow had immediate judgment against the tenant, leaving him to recover over in value against the heir.³

53. When the heir was vouched in respect to lands in the same county, if, instead of admitting himself to be bound, and entering into the warranty, he counterpleaded it, judgment was, it is said, postponed until after the trial of the issue between the husband's alienee and the heir;⁴ but according to other authorities, the widow was not to be delayed by the pendency of this question, but was entitled to immediate judgment against the tenant.⁵

54. If the heir on being vouched entered into the warranty, but pleaded that he had no assets, and issue was joined on that plea, the widow did not, as it seems, obtain her dower from the tenant until the issue was tried;⁶ she might, however, have immediate judgment against the tenant, but with a *cesset executio* until the trial of the issue,⁷ under which she would be entitled to her dower against him, unless it was found that the heir had assets, and in that case it seems that another judgment would be given for the widow to recover against the heir, and for the tenant to hold in peace.⁸ However, in the case where the heir denied having assets, the widow, instead of leaving that question to be decided between the heir and the tenant, might elect to take a conditional judgment to recover her dower from the heir, if he had assets in the county,

¹ See post, ch. xxii., §§ 50-52.

² 9 Co. 18 b., 19 a.; Co. Litt. 39 a., note 6; Booth, Real Act. 170.

³ 22 Vin. Abr. 79, pl. 5, 6; Ibid. 127, pl. 3; Br. Voucher, 4; Br. Dower, 2.

⁴ Jenk. 176; 22 Vin. Abr. 127, pl. 2.

⁵ Co. Litt. 39 a., note 6; 22 Vin. Abr. 127, pl. 1, 7; Ibid. 139, pl. 9; Bro. Dower, 21.

⁶ Jenk. 176.

⁷ Goldingham v. Saunds, Winch, 81, 88; Hutton, 71; Cro. Jac. 688. See Kilgrew's case, Cro. Eliz. 46.

⁸ Hutton, 72.

and if not, from the tenant;¹ and the reason why this election was allowed to her was said to be, that it might be for her benefit to recover her dower from the heir, rather than from the alienee, as the heir was bound to warrant to the widow the land of which she was endowed by him, which, it seems, was not the case where she was endowed by another.²

55. These rules applied only when the heir was vouched immediately by the tenant. If the tenant vouched one who vouched the heir, the judgment for dower was against the tenant alone.³

56. If the sheriff, after a recovery in dower, deliver seizin to the demandant upon the writ of *habere facias seisinam*, this is in law an ouster of all termors in possession of the land;⁴ and therefore if the title of the termor is prior to the title of dower, and this appear to the court, either upon the plea of the tenant,⁵ or the suggestion of the termor, on prayer to be received for his term, the interest of the termor will be saved in giving judgment.⁶ This is effected either by giving judgment specially that the demandant shall recover seizin of the reversion, upon which a writ of *habere facias seisinam* is awarded to the sheriff, with a proviso *quod ten. ad termin. annor. non expellatur*;⁷ or by giving judgment generally with a *cesset executio* during the term. The former mode is adopted where there is any rent reserved upon the lease for years, in order to enable the dowress, as the reversioner, to obtain the benefit of the rent;⁸ and although the rent reserved is but a pepper corn, it seems that the dowress is entitled to an immediate execution.⁹

¹ Grey v. Williams, Dyer, 202 b.; Co. Litt. 39 a., note 6; 22 Vin. Abr. 64, pl. 4.

² 9 Co. 18 b.; Winch, 88. See Park, Dow. 275; post, ch. xxix.

³ 9 Co. 18 b.; Co. Litt. 39 a., note 6; 22 Vin. Abr. 79, pl. 2, 3; 1 Roper, H. & W. by Jacob, 435-6.

⁴ See 3 Leon. 168. But it is said that he who claims the lease for years may re-enter into the land, notwithstanding the recovery and the execution of the dower; and if he be ousted he shall have his action. Foljambe's case, Godb. 165. And see Mitchell v. Hyde, 1 Leon. 92; and therefore it was thought in the former case, that the sheriff should serve execution as if there was not any lease for years. See, also, 1 Com. 188, and 2 Saund. by Williams, 7 c., note.

⁵ Ante, § 37.

⁶ See Williams v. Drew, 3 Leon. 168; Green v. Roe, 2 Com. 581; Booth v. Lindsey, 2 Raym. 1294.

⁷ Wheatley v. Best, Noy, 65; Cro. Eliz. 564.

⁸ 1 Roll. 678; Noy, 65; Anon. Ow. 32; Winch, 80; Foljambe's case, Godb. 165; Co. Litt. 32 b.; 1 Com. 188, in Bodmyn v. Child. But see Jenk. p. 73, pl. 38, contra.

⁹ See Pheasant v. Pheasant, 3 Ch. Rep. 69; Tiffin v. Tiffin, 2 Freem. 66.

57. If, however, there is no rent payable in respect of the term, as where lands are limited or devised to one for years, remainder to another in fee, or upon a common devise with no clause of reservation, execution will be stayed during the continuance of the term, as no benefit could arise to the dowress from her obtaining seizin.¹

¹ Perk. § 335; Noy, 65; Bodmyn v. Child, 1 Com. 185. And see Brown v. Gibbs, Prec. Ch. 97; 2 Freem. 233; Godb. 165; Park, Dow. 299, 300. For an account of proceedings in error in actions for dower, see 2 Saund 46 a., *et seq.* notes. As to the assignment of dower, and proceedings in connection therewith, see post, chapters xxi.-xxiv.; and as to damages, post, ch. xxv.

CHAPTER VI.

PROCEEDINGS AT LAW FOR THE RECOVERY OF DOWER IN THE UNITED STATES.

<p>§ 1, 2. Demand of dower.</p> <p>3, 4. Where and upon whom the demand must be made.</p> <p>5, 6. How and by whom the demand may be made.</p> <p>7-20. Actions for dower.</p> <p>21-25. Against whom the action should be brought.</p> <p>26-31. Averments of the declaration.</p> <p>32-40. Service of process.</p>	<p>41. Essoin.</p> <p>42. Impar lance.</p> <p>43 View.</p> <p>44-60. Pleas.</p> <p>61-65. The verdict.</p> <p>66-68. The judgment.</p> <p>69. Collusive recovery of dower.</p> <p>70. Remedy of the widow where she has lost her dower by default.</p>
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Demand of dower.

1. IN England no demand is necessary to enable the widow to institute proceedings for her dower,¹ and the same rule prevails in most of the American States.² Generally, however, a demand is made by the widow before resorting to her action, for unless this be done, she is, according to the common law, upon the plea of *tout temps prist* by the heir, restricted, in the recovery of damages to the time when her suit was commenced.³

2. But in some of the States statutes have been enacted making a demand of dower an essential pre-requisite to the right to proceed by action for its recovery. The Massachusetts statute of 1641 appears to have required this,⁴ and later enactments have fully established the rule in that State.⁵ Nor can any action be brought until the expiration of one month from the time of the demand.⁶ In

¹ Park, Dow. 303-305.

² Hitchcock v. Harrington, 6 John, 295-6; Jackson v. Churchill, 7 Cow. 287; Ellicott v. Mosier, 11 Barb. 574; s. c. 3 Seld. 201; Conover v. Wright, 2 Halst. Ch. 613, 617; Hopper v. Hopper, 2 Zab. 715.

³ See post, ch. xxv.

⁴ Anc. Laws and Charters Mass. Bay, 99. See vol. i., ch. ii., § 6.

⁵ Stat. 1783, ch. 40, § 1; Stat. 1828, ch. 137, § 5; Gen. Stat. Mass. c. 135, § 2; Stearns, Real Act. 301, 313; 1 Washb. Real Prop. 2d ed., 227, § 13.

⁶ Gen. Stat. Mass. p. 697, § 2.

New Hampshire,¹ Rhode Island,² and Maine,³ the rule is the same. In Connecticut⁴ sixty days must elapse from the time of the demand. Prior to the adoption of the revised statutes of 1852, a demand was also necessary in Indiana.⁵

Where and upon whom the demand should be made.

3. By the Massachusetts statute of 1783, it was required that the demand should be made of the person who took the next immediate estate of freehold, whether as heir, grantee, abator, or disseizor of the husband, though he might be a different person from the tenant of the freehold.⁶ The statute of 1828 provided that a demand should be made of the person who was *tenant of the freehold*;⁷ and as the requirement of the former statute, of a demand upon the heir or person having the next estate of freehold or inheritance was not dispensed with, it seems that a demand upon both, where they happened to be different persons, was rendered necessary by the law last referred to.⁸ The present statute directs that the demand shall be made of the person who is seized of the freehold.⁹ In Maine¹⁰ and New Hampshire,¹¹ the demand must be made of the person who is seized of the freehold at the time of making the demand, if he be in the State; otherwise of the tenant in possession. In Maine, when a corporation is the tenant of the freehold, the demand must be made of an officer thereof, on whom by law a writ in a civil action against it may be served; and sixty days must intervene between the demand and the suit.¹²

4. It has been held in some of the States, that a personal demand is required by these statutes; and that where there is more than one person seized of the freehold, a personal demand must be made on each of them. Where a widow wrote and signed a demand on three tenants

¹ N. H. Comp. Stat. 1853, p. 521, § 2.

² Rev. Stat. R. I. 1857, p. 504, § 7; *Ellis v. Ellis*, 4 R. I. 110.

³ Rev. Stat. Maine, 1857, p. 607, § 19.

⁴ Stat. Conn. 1854, p. 382, § 18; *Crocker v. Fox*, 1 Root, 227.

⁵ Ind. Rev. Laws, 209. See *McCormick v. Taylor*, 2 Carter, 336.

⁶ Stat. 1783, ch. 40, § 1; *Stearns*, Real Act. 301; *Parker v. Murphy*, 12 Mass. 485.

⁸ *Stearns*, Real Act. 301.

⁷ Stat. 1828, ch. 137, § 5.

⁹ Gen. Stat. Mass. ch. 135, § 2.

¹⁰ Rev. Stat. Maine, 1857, p. 607, § 19; *Ford v. Erskine*, 45 Maine, 484.

¹¹ N. H. Comp. Stat. 1853, p. 521, § 2.

¹² Rev. Stat. Maine, 1857, p. 607, § 20.

of the freehold to set out her dower in her husband's estate, and a deputy sheriff gave an attested copy of the demand into the hands of one of the tenants, and left an attested copy at the dwelling-house of each of the others, it was held that an action could not be maintained for want of a legal demand.¹ But proof that a paper addressed to the tenant, and subscribed by the widow, containing, in rightful form, a demand of her dower, was seasonably left at the dwelling-house of the tenant, where it was read by some of the inmates, taken in connection with an admission by him that dower had been demanded of him, will warrant a jury in finding that the paper was received and its contents understood by him; and if the jury should draw this inference, a sufficient demand would be established, although not proved to have been made upon him originally in person.² A demand upon two persons of dower in land held by them in severalty, will not support an action against either for dower in his part of the land. In such cases the actions must be distinct, and the demands should also be several, requiring of each to assign dower to the widow in land of which he was tenant of the freehold.³ A demand of dower in land owned by minor children, made of them and of their guardian, is sufficient; nor is it material that the guardian is not described as such in the notice.⁴ And it is not necessary that a demand of dower should be made upon the land.⁵ If the tenant of the freehold of whom the demand is made, afterwards convey, no new demand is necessary, but the widow may at once proceed against the tenant in possession when her action is commenced.⁶ In Rhode Island, leaving the demand with the tenant or person in possession, or if no one be in possession, by putting it up in any conspicuous place on the premises, is a sufficient service of demand upon all persons not within the State at the time.⁷ By the statute now in force in Massachusetts, a demand in writing, given

¹ *Burbank v. Day*, 12 Met. 557. The court did not determine what course should be pursued where the tenant was not within the State.

² *Luce v. Stubbs*, 35 Maine, 92.

³ *Pond v. Johnson*, 9 Gray, 193; *Stearns*, Real Act. 305. See *Fosdick v. Gooding*, 1 Greenl. 30.

⁴ *Young v. Tarbell*, 37 Maine, 509. In Indiana by the Act of Jan. 28, 1847, a demand upon infants was unnecessary. *McCormick v. Taylor*, 2 Carter, 336.

⁵ *Baker v. Baker*, 4 Greenl. 66; *Luce v. Stubbs*, 35 Maine, 92.

⁶ *Barker v. Blake*, 36 Maine, 433. See *Parker v. Murphy*, 12 Mass. 485; Gen. Stat. Mass. ch. 135, § 5.

⁷ Rev. Stat. R. I. 1857, p. 504, § 8.

to the tenant of the freehold, or left at his last and usual place of abode, is sufficient.¹

How and by whom the demand may be made.

5. A demand of dower need not be made by the widow personally;² it is sufficient if it be made by attorney, or by some person deputed to act in her behalf.³ And if the widow claim the benefit of such demand by bringing her action upon it, that is competent proof of the authority to make it.⁴ So a demand may be made by parol, and by one authorized to act by parol.⁵ In the English case above referred to, the only demand and refusal proved was, that a brother of the tenant "asked him if he would pay his mother her thirds," to which he answered "no." The authority to make the demand was not controverted, and the demand was held good.⁶ In New Hampshire,⁷ the demand is required to be in writing. So in Maine,⁸ if the tenant be a corporation.

6. No great particularity is required in the description of the premises of which dower is demanded. It will be sufficient if it designate them with reasonable certainty.⁹ But the demand should contain such a description as will give notice of what land dower is claimed. The description may be in terms, or by reference to a deed under which the tenant holds.¹⁰ Thus, where the demand on the tenant was of dower in land purchased of the husband, it was held sufficient, because the tenant could not but know to what the demand referred.¹¹ In another case, the demand was of dower in land conveyed in common to the husband of the widow and to

¹ Gen. Stat. Mass. p. 697, § 3.

² See *Watson v. Watson*, 10 C. B. 3; 70 Eng. C. L. 2; Co. Litt. 32 b.

³ Gen. Stat. Mass. p. 697, § 3.

⁴ *Stevens v. Reed*, 37 N. H. 49; *Baker v. Baker*, 4 Greenl. 66; *Luce v. Stubbs*, 35 Maine, 92, 95.

⁵ *Baker v. Baker*, 4 Greenl. 67; *Luce v. Stubbs*, 35 Maine, 92, 95; *Curtis v. Hobart*, 41 Maine, 230; *Page v. Page*, 6 Cush. 196; *Lothrop v. Foster*, 51 Maine, 367.

⁶ *Watson v. Watson*, *supra*.

⁷ N. H. Comp. Stat. 1853, p. 521, § 2. See, also, Gen. Stat. Mass. p. 697, § 3.

⁸ Rev. Stat. Maine, 1857, p. 607, § 20.

⁹ Gen. Stat. Mass. p. 697, § 3; *Haynes v. Powers*, 2 Foster (N. H.), 590; *Davis v. Walker*, 42 N. H. 482.

¹⁰ *Ford v. Erskine*, 45 Maine, 484; *Baker v. Baker*, 4 Greenl. 67; *Atwood v. Atwood*, 22 Pick. 283; *Haynes v. Powers*, 2 Foster (N. H.), 590.

¹¹ *Baker v. Baker*, 4 Greenl. 68.

the tenant, and as the tenant was a party to the conveyance, and could not be regarded as ignorant of what was thereby conveyed, no further description was deemed necessary.¹ So if the description be erroneous in some particulars, yet if it be sufficiently certain to notify the tenant of the land referred to, the demand will nevertheless be good.² Where a widow is entitled to be endowed of so much of a tract of land as will produce a yearly income equal to one-third of the yearly income of the tract at the time when her husband parted with his title to it, her demand of dower, if otherwise sufficient, will not be rendered invalid by a request contained therein that the tenant set out to her so much of the tract as will produce a yearly income equal to one-third the yearly income of the tract at the time of the decease of her husband, as her dower in the same.³ So where the widow demanded dower in the whole premises, when she was entitled to dower of a part, only, it was held that she might recover according to her title.⁴ Nor is a demand vitiated by the fact that the defendant is seized of part, only, of the land described in the notice ;⁵ nor by its requiring the dower to be set off in thirty days, as the statute does not require any time to be specified in the demand.⁶ But reference to a deed executed many years before to a third person, and not recorded, is no notice to the tenant of what was conveyed. Therefore a demand "of all lands of which W. F., my late husband was seized at any time during my coverture with him, and of which you are now seized of the freehold, and particularly of the land conveyed to J. T. by my said husband, by deed dated Oct. 19, 1819," is too vague and indefinite.⁷ In such a case, the tenant, to know of what lands dower is demanded, must first ascertain when the coverture commenced and ended, and whether his title to any lands of which he is in possession accrued between those dates. It is, substantially, a general demand of dower in all lands of which the widow is dowable. "A demand of dower in all lands whereof the husband was seized during coverture," says Wilcox, J., in *Fulton v. Fulton*,⁸ "or of all lands in which she had a right to dower, would not probably be sufficient." So where authority is given in writing to demand

¹ *Atwood v. Atwood*, 22 Pick. 283.

² *Ibid.*

³ *Davis v. Walker*, 42 N. H. 482.

⁴ *Hamblin v. Bank, &c.*, 19 Maine, 66 ; *Fulton v. Fulton*, 19 N. H. 168.

⁵ *Fulton v. Fulton*, 19 N. H. 168.

⁶ *Stevens v. Reed*, 37 N. H. 49.

⁷ *Ford v. Erskine*, 45 Maine, 484.

⁸ *Fulton v. Fulton*, 19 N. H. 168.

dower, if the writing contain no description of the premises, a demand under it will not support an action.¹

Actions for dower.

7. In several of the States, the common law mode of procedure by writ of dower *unde nihil habet* is substantially retained. The Massachusetts Colony Act of 1641, provided for "a writ of dowry,"² and by that of 1647, provision was made for the assignment of dower as at common law, by writ at the suit of the widow.³ The statute of 1783 contained a similar provision, and prescribed the form of the writ.⁴ By the present statute of that State, a writ of dower *unde nihil habet* may still be resorted to.⁵

8. The Virginia statute of 1705, directed that dower should be assigned in the manner prescribed by the laws of England.⁶ The same provision was contained in the Act of 1748.⁷ An Act passed in 1785, recognizes the right of the widow to proceed by the writ of dower *unde nihil habet*.⁸ By the present statute, dower may be assigned as at common law,⁹ and ejectment may be brought for its recovery.¹⁰

9. In Maine,¹¹ New Jersey,¹² Delaware,¹³ New Hampshire,¹⁴ and Rhode Island,¹⁵ the widow may proceed by action of dower.

10. In Pennsylvania, also, a statute is in force providing for the recovery of dower by action.¹⁶ It has been several times decided, however, that the widow can not proceed by ejectment before her dower has been assigned.¹⁷ In one case it was observed by

¹ Sloan v. Whitman, 5 Cush. 532.

² Anc. Laws and Charters Mass. Bay, 99. See vol i., ch. ii., § 6.

³ 2 Mass. Stat. App. 969; Sheafe v. O'Neil, 9 Mass. 9.

⁴ Stat. 1783, ch. 40, § 3.

⁵ Gen. Stat. Mass. ch. 134, § 1; ch. 135, § 1; Stearns, Real Act. 301, 302; 1 Washb. R. P. 2d ed., p. 228, § 14.

⁶ 3 Hen. Stat. 374. See vol i., ch. ii., § 5.

⁷ 5 Hen. Stat. 448, § 14.

⁸ Acts of 1785, ch. 65, § 2; 12 Hen. Stat. 162.

⁹ Code Va. 1849, p. 475, § 9.

¹⁰ Ibid. p. 558, § 2; p. 561, § 29.

¹¹ Rev. Stat. Maine, 1857, p. 607, § 18. See Stat. 1821, p. 149, § 1.

¹² Nixon's Dig. p. 209, § 4. See Paterson, p. 343, § 4.

¹³ Del. Rev. Code, 1852, p. 291, § 10. See Laws Del. 1829, p. 164, § 1; Layton v. Butler, 4 Harring. 507.

¹⁴ N. H. Comp. Stat. 1853, p. 521, § 1. See N. H. Laws, p. 538, § 1.

¹⁵ Rev. Stat. R. I. 1857, p. 504, § 7. See Laws R. I. 1822, p. 190, § 6.

¹⁶ Purdon's Dig. by Brightly, p. 39, § 1.

¹⁷ Pringle v. Gaw, 5 S. & R. 536; Galbraith v. Green, 13 S. & R. 85; Bratton v. Mitchell, 7 Watts, 113; Thomas v. Simpson, 3 Barr, 60. See ante, ch. ii., § 18.

the court that the action contemplated by the statute "is strictly a real action, originating in, and proceeding upon the principles and according to the forms of the common law."¹ But it seems that the widow can not resort to the common law courts for the recovery of dower in lands of which her husband died seized, except in cases where the defendant claims adversely to her right, or is not amenable to the process of the orphans' court.

11. This subject was considered in *Galbraith v. Green*,² and it was there determined that the widow may maintain an action of dower against a person in possession claiming by title adverse to that of the heirs of her husband. "The assignment of the third error," the court said, "has raised a question of considerable importance, viz., whether, by the law of Pennsylvania, a woman can support an action of dower against a person who is in possession of land supposed to belong to the estate of her late husband, and claiming by title adverse to his heirs. When the husband has aliened the land in his lifetime, the right of the wife to support an action of dower, is not questioned. But the counsel of the defendants have contended, that, whenever the land descended from the father to his heirs, our intestate laws take from the wife her right of dower at the common law, and give her in lieu of it, either one-third of the land for her life, or, in case the estate will not conveniently admit of this partition, the interest for life, of one-third of the money at which the whole real estate shall be valued, on an appraisement to be made by order of the orphans' court. My opinion will be confined to the case before the court, where the husband, although he might have died seized *in law*, yet did not die in *actual possession* of the land in which dower is claimed by the plaintiffs. I do not see how the orphans' court, who are authorized to make partition between the widow and children of the estate, could well proceed to a partition of land out of possession."

12. In a subsequent case, in which a testator had directed that the residue of his estate, except a house devised to his wife in addition to her dower, should descend in the manner provided by law when no will is made, it was held that the widow could not maintain an action of dower. The ground upon which the court proceeded, was, that if the property passed by descent, the will being

¹ *Jones v. Patterson*, 12 Pa. St. (2 Jones), 149, 154. See, also, *Seaton v. Jamison*, 7 Watts, 533.

² *Galbraith v. Green*, 13 S. & R. 85, 93.

inoperative, the exclusive jurisdiction was vested in the orphans' court, the decedent having died seized and *possessed*; if it passed under the will, the widow was a purchaser, and ejectment was the proper remedy.¹ "In *Galbraith v. Green*,"² the court remarked, "it is ruled that an action of dower may be maintained in Pennsylvania, and that in lands held by a person claiming by title adverse to the heirs. But that case is decided on its special circumstances, and in no sense militates against the general principle which assigns exclusive jurisdiction to the orphans' court. The decision is put on the ground, that although the husband may have died seized in law, yet he did not die in actual possession of the land in which the dower is claimed. In such a case, the action of dower lies; for otherwise the widow is without remedy, inasmuch as the orphans' court have no authority to make partition between the widow and children of the intestate, unless the intestate die possessed, as well as seized of the estate. She can not sustain an ejectment, nor can she compel the heirs to bring an action, so as to vest jurisdiction in the orphans' court. From necessity, therefore, the common law courts have jurisdiction. The exception proves the rule. Indeed, no case of intestacy is recollected, (except where the husband dies out of possession of the premises), where an action of dower can be sustained. When the widow has a complete and adequate remedy by statute, she is not permitted to resort to the common law remedy, and thereby disturb the harmony of the system prescribed by legislative enactment."

13. But according to recent decisions, the orphans' court have no power to assign to a widow *common law* dower³ in any case, exclusive jurisdiction thereof being vested in the common law courts.⁴ And it is held that a widow may claim her *statutory* dower⁵ by the common law action when the land is in the adverse possession of one denying her right,⁶ or where it is in the possession of the devisee of her husband, and she has elected not to take under the will.⁷ It

¹ *Thomas v. Simpson*, 3 Barr, 60.

² *Galbraith v. Green*, *supra*.

³ See vol i., ch. xx., § 20.

⁴ *Bradfords v. Kents*, 43 Pa. St. 474; *Shaffer v. Shaffer*, 50 Pa. St. (14 Wright), 394.

⁵ See vol. i., ch. xx., §§ 18-20.

⁶ *Evans v. Evans*, 29 Pa. St. (5 Casey), 277.

⁷ *Bradfords v. Kents*, 43 Pa. St. 474; *Shaffer v. Shaffer*, 50 Pa. St. (14 Wright), 394.

is settled, also, that the widow of an intestate tenant in common may maintain a writ of dower, as at common law, for her third of her husband's proportion of the land.¹ So the common law courts have jurisdiction in dower by the widow of a tenant in common who died seized of a fee simple in one parcel of the land, and of a fee simple determinable by executory devise in another parcel.²

14. In Kentucky, in 1796, that portion of the Virginia statutes³ was re-enacted which directs the widow to be endowed in the manner provided by the laws of England.⁴ In the case of *Waters v. Gooch*,⁵ it was held, that the writ of dower *unde nihil habet*, although an unusual, was nevertheless an appropriate remedy for obtaining dower in that State. "As no statute of Kentucky, or of Virginia, prior to the separation," the court said, "has prescribed the mode of procedure throughout, and as the bill in equity had, in the practice of both States, superseded the real action of the common law in cases in dower, we have to decide now for the first time, and without the aid of any direct authority, how far the ancient British forms in such cases shall prevail, and what is the proper mode of proceeding in the courts of this State. . . . A statute of Virginia, (1748,) re-enacted in this State in 1796,⁶ declares that 'process in all real actions shall be the same, and have the same effect as in England, except that the returns shall be according to the laws of this Commonwealth;' and also allows one imparlance, and abolishes 'views,' essoins, and 'vouchers.' An act of 1798,⁷ reformed the method of proceeding in writs of right; but the mode of proceeding in writs of dower has never been specially regulated by any statute. We are of opinion, however, that the statute of 1810,⁸ and that of 1811,⁹ for regulating civil proceedings in all suits at common law, must be understood as applying to writs for dower, not only as to the service, and return of process, but also as to pleadings and trial."¹⁰

15. By the South Carolina Act of 1786,¹¹ a widow entitled to dower was authorized to apply by petition to the judges of the court

¹ *Brown v. Adams*, 2 Whart.-188; *Evans v. Evans*, 9 Barr, 190; s. c. Phil. Rep. 113.

² *Evans v. Evans*, 9 Barr, 190; s. c. Phil. Rep. 113.

³ Ante, § 8.

⁴ 1 Stat. Ky., p. 444, § 8.

⁵ *Waters v. Gooch*, 6 J. J. Marsh. 586, (1831).

⁶ 1 Dig. 66.

⁷ Ibid.

⁸ 1 Dig. 258.

⁹ 1 Dig. 262.

¹⁰ See, also, *Taylor v. Brodrick*, 1 Dana, 345; *Yancy v. Smith*, 2 Met. (Ky.)-408.

¹¹ P. L. 408-9; 1 Brev. Dig. 270, § 7; 4 S. C. Stat. 743.

of common pleas, setting forth fully and particularly her right or claim thereto, and praying a writ of admeasurement thereof; and it was provided, that immediately thereupon one of the judges of said court should cause a summons to be issued, directed to the proper parties, requiring them to appear and show cause why the prayer of the petition should not be granted. By the statute of 1799,¹ it was rendered unnecessary to petition for a summons in dower, and the same was declared to be demandable of common right. Under these statutes, the defendant must show cause at the return of the rule, why the writ should not issue; otherwise the return of the commissioners will be conclusive between the parties.² And if he appear and plead matters in bar which are triable by a jury, the demandant must file her declaration, and an issue be made up.³

16. The New York statute of 1787, recognized the right of the widow to proceed by the writ of dower *unde nihil habet*, and this provision was carried into subsequent enactments;⁴ but this mode of procedure has since been abolished, and the action of ejectment substituted in its stead.⁵ The legislation making this change affects only the forms or mode of proceeding, and does not alter or modify the right or interest of the widow in the land.⁶ The action may be brought after the expiration of six months from the time when the right accrued.⁷

17. Provision is also made for the recovery of dower by the action of ejectment, in Michigan,⁸ Illinois,⁹ and Virginia.¹⁰ In Mississippi,

¹ 2 Faust, 315; 1 Brev. Dig. 271, § 11; 7 Stat. S. C. 294.

² Tongue v. Gist, 1 N. & M. 110.

^{*} Righton v. Righton, 1 Rep. Con. Court, 130.

⁴ 1 Laws N. Y. (1813,) p. 57, § 3.

⁵ 2 N. Y. Rev. Stat. 303, 343, § 24. Proceedings for the admeasurement and recovery of dower may also be had under the code. See Townsend v. Townsend, 2 Sandf. S. C. 711; Crary, Special Proceedings, 10; Code of Procedure, §§ 307, 455.

⁶ Yates v. Paddock, 10 Wend. 528. Before the remedy was changed by the revised statutes to recover dower *unassigned*, the action of ejectment would lie to recover possession after admeasurement. Jackson v. Hixon, 17 John. 123; Jackson v. Randall, 5 Cow. 168; Borst v. Griffin, 9 Wend. 307, 310.

⁷ 2 N. Y. Rev. Stat. 303, § 2.

⁸ 2 Comp. Stat. Mich. 1857, ch. 134. The writ of dower is abolished. Ibid. p. 1267.

⁹ 1 Stat. Ill. 1858, p. 214, § 2; p. 153, § 18. See, also, Rev. Stat. Wis. 1858, ch. 141.

¹⁰ Code Va. 1849, p. 558, § 2.

a summary method is adopted for the assignment of dower,¹ and it is held that the common law mode of proceeding is abolished.² But after dower has been set out in lands in the adverse possession of another, ejectment may be brought by the widow for the part assigned to her.³

18. The various statutes relative to proceedings for the recovery of dower in Iowa, were considered in the case of *O'Ferrall v. Simplot*.⁴ "The Act of December 29, 1838," the court observed in that case, "relating to the action of right, in section one, declares that to be the proper remedy for recovering any interest in land; section fifty-six expressly recognizes it as the appropriate action for the recovery of dower; and section twenty-one gives damages by way of the use, occupation and profits accruing within six years prior to the commencement of the action. This act continued the law until the adoption of the code.⁵ That of February 16, 1843, was but an amendment of it;⁶ and that relating to the action of ejectment, does not interfere with it, at least in this respect.⁷ Chapter 116 of the code relates to actions for the recovery of real property,⁸ and the enactments of that chapter apply to 'any person having a valid, subsisting interest in real property, and a right to the possession thereof.' Section 2027 in the same chapter, recognizes it as the proceeding to recover an interest in dower,⁹ and section 2008 gives damages, under the name of the use and occupation for six years prior to the commencement of the action.¹⁰ It is immaterial, then, under which of these statutes the widow may claim."¹¹

19. In Missouri, the remedy is by petition in the circuit court of the county where the lands are situate; if the lands are divided

¹ See post, ch. viii., §§ 41-45.

² *Caillaret v. Bernard*, 7 S. & M. 316.

³ *James v. Rowan*, 6 S. & M. 393; *Bisland v. Hewett*, 11 S. & M. 164; *Pickens v. Wilson*, 13 S. & M. 691; *Farmers & Mech. Bk. v. Tappan*, 5 S. & M. 112; *Holloman v. Holloman*, *Ibid.* 559. See post, ch. viii., § 23.

⁴ *O'Ferrall v. Simplot*, 4 Iowa, 381.

⁵ Stat. 1843, p. 527.

⁶ Stat. 1843, p. 257.

⁷ Stat. 1843, p. 259.

⁸ See Laws of Iowa, Rev. 1860, ch. 144.

⁹ In an action for the recovery of dower before admeasurement, the plaintiff must show, in addition to evidence of right, that the defendant either denied the right, or did some act amounting to such denial. Laws of Iowa, Rev. 1860, § 3605.

¹⁰ *Ibid.* § 3576.

¹¹ By the act of April 8, 1862, the common law right of dower is abolished, and the widow is entitled to one-third in fee of the land in which the husband had a legal or equitable interest during the marriage, which has not been sold on execution or other judicial sale. Laws of Iowa, 1862, pp. 173-5. See vol. i., ch. ii., § 36.

by a county line, the action may be commenced in either county.¹ When the lands lie in several counties, and are not severally held by different devisees or purchasers, the petition is to be preferred in the county in which the principal messuage is situate; if there be no messuage, then in any county in which any of the lands lie.² If the defendant appear and plead, the cause is to proceed according to the course of the common law.¹ Where there are several defendants, some of whom are summoned or appear, and others do not, the demandant may proceed against those summoned or appearing, without regard to the others, or may continue the cause for service.³ The Kansas statute provides for substantially the same mode of procedure.⁴

20. In the North Carolina case of *McMillan v. Turner*,⁵ the court say: "In *Spencer v. Weston*,⁶ a question is made, but not decided, whether, in this State, dower is not necessarily assignable at law by petition only. There is no doubt that the remedy by petition, as prescribed by the Act of 1783,⁷ is a substitute for the action of dower at the common law." In a Tennessee case it was held, under the same statute, that if the right to dower is disputed, a jury must be empannelled to try it.⁸ By the present statute of Tennessee, county courts have concurrent jurisdiction with the circuit and chancery courts of applications for dower.⁹ In Ohio, a statute has been in force for many years directing that the remedy for the recovery of dower shall be by petition in chancery;¹⁰ but by an amendatory Act recently adopted, the widow is authorized to proceed as in civil actions under the code.¹¹

Against whom the action should be brought.

21. In the States where the writ of dower is retained, the action must be brought against the person who is tenant of the freehold

¹ 1 Rev. Stat. Misso. 1855, p. 674, § 28.

² Ibid. § 29.

³ Ibid. p. 675, § 30.

⁴ Comp. Laws Kansas, 1862, p. 480, §§ 8, 18, 19.

⁵ *McMillan v. Turner*, 7 Jones, L. 435.

⁶ *Spencer v. Weston*, 1 Dev. & Bat. 213.

⁷ Rev. Code N. C. ch. 118, § 2. See vol. i., ch. ii., § 15, and post, ch. viii, §§ 54-59.

⁸ *Thompson v. Stacy*, 10 Yerg. 493.

⁹ Code Tenn. 1858, § 2407. See post, ch. viii., §§ 63-66.

¹⁰ 1 Rev. Stat. Ohio, by Swan & Critchf., p. 520, § 9.

¹¹ Act of March 9, 1866; 63 Ohio Laws, p. 33.

at the time of commencing the action, even though he hold by wrong, as a disseizor, abator, or intruder.¹ The writ can not be maintained against a tenant for years, only.² And a tenant for years to whom notice is given on a writ of dower against several defendants, is not to be considered a defendant.³ But in Rhode Island, under the statute of that State, a writ of dower may be maintained against a tenant for years in possession.⁴ Where a person occupies and improves real estate which is manifestly beneficial, and a lease for life to such occupant, for a nominal rent, from the owner, is found upon the records of the county, in the absence of other testimony, it will be presumed that the occupant holds under the lease.⁵ And where such lessee is a married woman, a widow entitled to dower in the premises may enforce her claim against both husband and wife.⁶ A vendor by articles, before deed made to his vendee, and while any portion of the consideration remains due, has such a legal seizin in the land as constitutes him tenant of the freehold, and he is not only a proper, but a necessary party to the action.⁷ The widow of a tenant in common whose interest was conveyed in his lifetime, without release of dower, to his co-tenant, may maintain a writ of dower against the latter, and have her dower set out to her by metes and bounds.⁸ But tenants in severalty of distinct parcels can not be joined in a writ of dower, even though the husband during coverture was seized of the several tracts; in such case a separate action should be instituted against each tenant for dower in the parcel held by him.⁹ But several parcels in possession of the same tenant, and in the same town, may be included in one suit at law.¹⁰

¹ 1 Washb. R. P. 2d ed., p. 229, § 14; *Hurd v. Grant*, 3 Wend. 340; *Norwood v. Marrow*, 4 Dev. & Bat. L. 442; *Miller v. Beverly*, 1 Hen. & Mun. 368; *Otis v. Warren*, 16 Mass. 53; *Galbraith v. Green*, 13 S. & R. 85, 94; *Seaton v. Jamison*, 7 Watts, 533, 537; Gen. Stat. Mass. p. 697, § 1; Rev. Stat. Maine, 1857, p. 607, § 23. See ante, ch. v., § 3.

² *Miller v. Beverly*, 1 Hen. & M. 368; *Galbraith v. Green*, 13 S. & R. 85, 94.

³ *Galbraith v. Green*, 13 S. & R. 85.

⁴ Rev. Stat. R. I. 1857, p. 504, § 7; *Ellis v. Ellis*, 4 R. I. 110.

⁵ *Libbey v. Staples*, 39 Maine, 166.

⁶ *Ibid.*

⁷ *Jones v. Patterson*, 12 Pa. St. 149. The court were in doubt whether the vendee in such a case may be summoned conjointly with the legal tenant. See, also, *Kennedy v. McAliley*, 9 Rich. L. 395.

⁸ *Blossom v. Blossom*, 9 Allen, 254.

⁹ *Fosdick v. Gooding*, 1 Greenl. 30. See *Allen v. McCoy*, 8 Ohio, part 2, pp. 418, 463; *Barney v. Frowner*, 9 Ala. 901.

¹⁰ *Taylor v. Brodrick*, 1 Dana, 345.

22. The South Carolina statute requires that the summons in dower shall be directed, 1, to the heir at law, (if of full age); 2, if under age, to his or her guardian; 3, if there be no guardian, to the executor or administrator of the deceased; or 4, to any person or persons who may be in possession.¹ Under this statute, a summons lies against any one in possession of the land, whether the title is in himself or in another.² And it lies as well against the tenant for life, or in fee, as against the person in possession.³ And a plea that before the commencement of the suit the defendant had "bargained and sold" the land, and that the purchaser was put in possession and continued to occupy the premises, is no bar to the action; such an allegation does not import a conveyance by deed, but is an averment merely of a contract of sale.⁴

23. In Missouri⁵ and Kansas⁶ the action may be brought against any person claiming an interest in the lands, or who is in possession, or who has deforced the widow of her dower. Any one claiming title may be made a defendant, if he shall appear and apply for that purpose.⁷ But where a widow is in possession of real estate, and afterwards rents it, she can not have dower assigned against the tenant, but must pursue her remedy against him as her tenant.⁸

24. In New York, as the statute regulating proceedings by ejectment abolishes the use of fictitious names,⁹ the action is to be commenced against the actual occupant of the premises, whether tenant of the freehold or not, in which dower is claimed, and who is to be named as defendant. If the premises are not occupied, the action should be brought against some person exercising acts of ownership on them, or claiming title thereto, or some interest therein at the commencement of the suit.¹⁰ In *Shaver v. M'Graw*,¹¹ Sutherland, J., doubted whether the principle of the action of dower does not control the action in its present form; and whether, therefore, the action of ejectment in such a case will lie against any other person than the tenant of the freehold; but in

¹ 1 Brev. Dig. p. 270, § 7.

² *Plantt v. Payne*, 2 Bailey, 319.

³ *Kennedy v. McAliley*, 9 Rich. L. 395.

⁴ *Ibid.*

⁵ 1 Rev. Stat. Misso. 1855, p. 674, § 28.

⁶ Comp. Laws Kansas, 1862, p. 480, § 18.

⁷ 1 Rev. Stat. Misso. 1855, p. 675, § 30; Comp. Laws Kansas, 1862, p. 480, § 19.

⁸ *Collier v. Wheldon*, 1 Misso. 1.

⁹ 2 N. Y. Rev. Stat. p. 304, § 6.

¹⁰ 2 N. Y. Rev. Stat. p. 304, § 4.

¹¹ *Shaver v. M'Graw*, 12 Wend. 558.

Sherwood v. Vandenburg,¹ it was held that the action may be maintained against the actual occupant, although he is not the owner or tenant of the freehold. This doctrine was afterwards affirmed in the court of appeals, in the case of *Ellicott v. Mosier*.² "It may be doubted," said Ruggles, Ch. J., "whether it entered into the minds of the revisers or of the legislature, in framing the 4th and 13th sections of the statute, that they were authorizing a recovery in dower against a temporary occupant who had no authority to assent to the plaintiff's claim, or to set apart her dower; but such is the effect of the language used, and the statute must be obeyed. It clearly contemplates the bringing of the ejectment for dower as well before any admeasurement as after, and the authority to bring the action is not limited to cases in which the premises are occupied by the owner of the fee simple or freehold." But if the action be not brought against the owner of the land, neither the judgment in ejectment nor the admeasurement binds him. And if the widow choose to proceed by ejectment against the occupant of the land, instead of applying in the first instance to have her dower admeasured, the latter has no reason to complain. It is of no consequence to him whether the tenant of the freehold is bound or not. The inconvenience or disadvantage of proceeding against the temporary occupant, falls chiefly on the widow herself, whose judgment at most binds only the tenant for years.³ It is obvious, therefore, that when the occupant has only a temporary right of possession, it would be more advisable for the widow to have her dower admeasured under the statute,⁴ before she brings ejectment. The tenant of the freehold is a proper and necessary party in that case; and he may afterwards be made a party to the ejectment.⁵

25. In Illinois,⁶ and Michigan,⁷ the provisions of the New York statute upon this subject have been substantially re-enacted. In

¹ *Sherwood v. Vandenburg*, 2 Hill, 303.

² *Ellicott v. Mosier*, 3 Seld. 201; s. c. 11 Barb. 574. It was decided in this case that where the widow is entitled to dower in a block of lots in a city, the action may be maintained against the occupant of a single floor of a store erected upon one of them, who has hired it of the owner for a single year.

³ *Ellicott v. Mosier*, 3 Seld. 201, per Ruggles, Ch. J.

⁴ 2 N. Y. Rev. Stat. 488. See post, ch. viii., §§ 2-11.

⁵ 2 Rev. Stat. 341-2; 3 Rev. Stat. 2d ed., 717, Revisers' note; *Ellicott v. Mosier*, 3 Seld. 201, 208, per Ruggles, Ch. J.

⁶ 1 Stat. Ill. 1858, p. 214, § 4; p. 153, § 18.

⁷ 2 Comp. Laws Mich. p. 1230, §§ 2, 4.

the last-named State, all persons claiming title adverse to the plaintiff, may be made defendants.¹

Averments of the declaration.

26. The form of the count, in the States where the writ of dower *unde nihil habet* may be resorted to, is very nearly the same as at common law.² It is not necessary to describe the lands by metes and bounds, if they are sufficiently distinguished and known by any particular name, or other description.³ But the description must be so certain that seizin may be delivered by the sheriff without reference to any description *dehors* the writ; and a defect therein can not be cured by a reference to a deed on record.⁴ It is error to allow a recovery of dower of one-half of the land, when the claim on record is for one-third, only.⁵

27. The declaration must allege a seizin of the husband of an estate of which, by law, his widow is dowable, or it will be insufficient.⁶ Thus, where it was averred that the husband "was seized during the coverture," it was held that this did not show a seizin in fee, nor of any estate of which the widow was dowable.⁷ So,

¹ 2 Comp. Laws Mich. p. 1230, § 4.

² Stearns, Real Act. 302. The following form has been adopted in Massachusetts: Summon A. to answer unto M. S. who was the wife of J. S. late of, &c. deceased, in a plea of dower, wherein she demands against the said A. the third part of one messuage, [or, of sixty acres of land, &c.,] with the appurtenances, in C. bounded, &c., as the dower of the said M. of the endowment of the said J. S., her said husband, whereof she hath nothing. Whereupon the said M. complains and says that the said J. S., her said husband, during the coverture of the said M. with the said J. S., was seized of the messuage aforesaid, [or, of the said sixty acres of land,] with the appurtenances, in his demesne as of fee; and that since the decease of the said J. S., her said husband, and more than one month before the suing forth of this writ, to wit, on the tenth day of, &c., she the said M. demanded of the said A. then, and ever since, tenant in possession, and having the immediate estate of freehold in the said messuage, [or, the said sixty acres of land,] to assign and set out to her, the said M., her reasonable dower therein, which the said A. hath refused to do, and still deforceth the said M. thereof. Stearns, Real Act. App. No. 75. See ante, ch. v., § 13, note.

On writs of dower in Kentucky, a count is necessary, whether the defendant appear, or not. *Waters v. Gooch*, 6 J. J. Marsh. 586. See *Taylor v. Brodrick*, 1 Dana, 345.

³ Stearns, Real Act. 302; *Ayer v. Spring*, 10 Mass. 83.

⁴ *Atwood v. Atwood*, 22 Pick. 283.

⁵ *Evans v. Evans*, 29 Pa. St. (5 Casey), 277.

⁶ *Freeman v. Freeman*, 39 Me. 426; *Waters v. Gooch*, 6 J. J. Marsh. 586.

⁷ *Freeman v. Freeman*, 39 Maine, 426.

where the allegation was, that the husband had "purchased" the land of which dower was claimed, this was declared not equivalent to an averment that he had acquired a freehold interest; because he might have "purchased" an estate for years, of which his wife could not be endowed.¹ So the count must aver in substance, that the wife was the wife of the person of whose estate she claims dower.² In an action for dower against a purchaser from the husband, the petition set forth, that the husband was the owner of, and held title to the land in July, 1855, and that the plaintiff was his wife at the time of his death in 1858; but it did not aver that she was his wife in 1855, when the purchase was made by the defendant, nor that the husband had right or title during the coverture. It was held that the petition was insufficient.³ But if the demandant do not directly allege that her husband was seized of the premises during the coverture, but does aver that she was by law dowable as of the endowment of her late husband, the defect will be cured by a verdict in her favor.⁴

28. In Missouri, it is held that a petition for the assignment of dower, alleging that the husband died seized of the land, and that his estate was an estate of inheritance, sufficiently describes the character of the husband's title, as a freehold of inheritance.⁵ And in North Carolina, it is sufficient for the widow to aver that her husband died seized of the lands. It is not necessary to state that the heirs entered as heirs, or to set forth deeds executed to them by her husband in his lifetime, and allege that they were fraudulent as to her. Upon the trial of the issue, if made by the pleadings, whether he died seized or not, the question of fraud will arise.⁶

29. In the States in which a demand is necessary to entitle the widow to bring her action,⁷ the declaration must show that this requirement has been complied with.⁸ In Maine, it must allege that the demand was of the person then seized of the freehold, if within the State; otherwise of the tenant in possession.⁹

¹ *Waters v. Gooch*, 6 J. J. Marsh. 586.

² *Ibid.*; *Yancy v. Smith*, 2 Met. (Ky.) 408.

³ *Yancy v. Smith*, 2 Met. (Ky.) 408.

⁴ *Elliot v. Stuart*, 15 Maine, 160.

⁵ *Lecompte v. Wash*, 9 Misso. 451. See *Collier v. Wheldon*, 1 Misso. 1.

⁶ *McGee v. McGee*, 4 Ired. L. 105. See vol. i., ch. xxix., §§ 23-25.

⁷ *Ante*, § 2.

⁸ *Freeman v. Freeman*, 39 Maine, 426. See *McCormick v. Taylor*, 2 Carter (Ind.), 336; *Stearns*, Real Act., 2d ed. 429, note.

⁹ *Freeman v. Freeman*, 39 Maine, 426.

30. In New York, the declaration in ejectment should contain but one count,¹ and it should state that the plaintiff was possessed of one undivided third part of the premises, as her reasonable dower of her husband; and of which the defendant dispossessed her.² The premises in which dower is claimed must be described with convenient certainty, designating the number of the lot, or township, if any, in which they are situated; if none, stating the names of the last occupants of lands adjoining the same, if any; if there be none, stating the natural boundaries, if any; and if none, describing the premises by metes and bounds, or in some other way, so that from the description, possession of the premises claimed, may be delivered.³ A declaration claiming the one undivided third part of all that part of a certain lot in a certain township, of which the defendant is in possession under a purchase at a sheriff's sale on execution against A. B., is sufficiently definite; and a further designation of the premises by reference to a record of partition in a public office, does not hurt the declaration.⁴ Nor is it any objection to a recovery in ejectment, that the right of the widow, as proved on the trial, varies from that set up in the declaration; as where it is shown to be subject to a previous estate in dower assigned in the premises, and the declaration alleged generally that the plaintiff was possessed of an undivided third part of the premises, without noticing the dower previously assigned.⁵ Where dower has been set out by admeasurers appointed by the surrogate,⁶ and ejectment is brought for the recovery of possession of the premises, the plaintiff is not bound to declare by demanding the one undivided third part, but may demand the specific lands admeasured. Where, however, in such case, an undivided third part is demanded, and the plaintiff on the trial shows that such admeasurement was had on due notice to the defendant, and a verdict is rendered for the specific portion assigned as dower, the court will, after the verdict permit an amendment of the declaration, and will not send back the parties to a new trial.⁷

31. The statutes of Michigan⁸ and Illinois,⁹ are almost identical, in the particulars above referred to, with the statute of New York.

¹ 2 N. Y. Rev. Stat. p. 304, § 11.

² Ibid. § 10.

³ Ibid. § 8.

⁴ Bear v. Snyder, 11 Wend. 592.

⁵ Ibid.

⁶ See post, ch. viii., §§ 2-11.

⁷ Borst v. Griffin, 9 Wend. 307.

⁸ 2 Comp. Laws Mich. 1857, ch. 134, §§ 4, 6, 8, 10, 11.

⁹ 1 Stat. Ill. 1858, p. 214, §§ 4, 6, 8, 9.

Service of process.

32. The Delaware statute requires, that in actions of dower, the writ shall be served upon the tenant either personally, or by copy left at his usual place of abode; if he can not be found, and have no known place of abode in the county, a copy served upon the person occupying the premises mentioned in the writ, or left at the dwelling-house on the premises, in presence of two or more persons of the neighborhood, may be regarded by the court as a good service. If a copy be served on a person occupying the premises under rent, it is made his duty to give notice thereof to his landlord in the same manner, and he will incur the same penalty for default, as if it were a declaration in ejectment. No process of *petit* or *grand cape* is allowed; but when the writ is served, if the tenant do not appear at the return, judgment will be rendered by default. But if service be not made upon the tenant, the court may, in its discretion, require public, or other notice to be given, and allow time for his appearance at the next term.¹

33. In New Hampshire, a summons issues in actions for dower,² and the statute directs that it shall be served by reading it to the defendant, or by giving him an attested copy, or by leaving such copy at his usual place of abode; a like copy is required to be left with the tenant in occupation of the land, if any.³ When the defendant is not an inhabitant of the State, or his residence is unknown to the officer serving the writ, or he is absent from the State, and shall not have returned at the time appointed for the trial, and no personal service is made on him, service may be made, or notice of the pendency of the suit given in the same manner as is provided for the service of writs, or notice of the pendency of suits in personal actions in like cases, where property is attached.⁴

34. The Massachusetts statute provides, that in real actions, if the defendant or tenant in the action is out of the State, and has no last and usual place of abode there, known to the demandant, the summons, or an attested copy, shall, in addition to any other service required, be left for him with the tenant or occupant of the demanded premises, if there be any, and if not, in some conspicuous place on the premises.⁵

¹ Laws Del. 1829, p. 164, § 1; Rev. Code, 1852, p. 291, § 10.

² N. H. Comp. Stat. 1853, p. 561, § 3. ³ Ibid. p. 466, § 2. ⁴ Ibid. p. 467, § 8.

⁵ Gen. Stat. Mass. p. 623, § 27.

35. In Maine, the statute requires that the writ in an action of dower, shall be served by attachment and summons, or copy of the writ, on the defendant; but if he be not in possession, the officer must give the tenant in hand, or leave at his place of last and usual abode, an attested copy of the writ; and if the defendant is not an inhabitant of the State, the service on the tenant shall be a sufficient notice to the defendant, or the court may order further notice.¹

36. The Pennsylvania statute directs that the writ shall be a summons, returnable in the manner, and according to the rules in personal actions.² Where a tract of land, or any other single tenement, situate in different counties, is the subject of the action, the suit may be commenced in either county; and the sheriff of the county in which the writ issues, has power to execute it, and all other process, whether original or final, issued in the case.³ But service on a defendant out of the county in which the action is commenced, may be made by the sheriff of the county in which such defendant resides, or may be found.⁴

37. It was held in Kentucky, in the case of *Waters v. Gooch*,⁵ that neither the *grand* nor *petit cape* is applicable or proper in the procedure by writ of dower in that State; because, according to the statute regulating the mode of proceeding in common law actions, a judgment may be obtained at the appearance term; nor is any other process necessary or proper for warning the tenant than a writ in the nature of the *precipe*, the form of which is given, in outline, by an act of 1796.⁶

38. In South Carolina, a summons must issue, directed to the proper parties, commanding them to appear within a specified time and show cause against the prayer of the petition.⁷ And it has been held, that the proper form of the summons, is a rule or order of court, and not a writ; and it need not have a seal or regular *teste* and return; but if the form of a judicial process be given to it, it is not therefore void; yet in such case, it must be made returnable as other writs are, or it will be quashed.⁸ The service is to be proved on oath by the person who served it, in open court, on

¹ Rev. Stat. Maine, 1857, p. 609, § 1.

² Purdon's Dig. by Brightly, p. 39, § 5.

³ Ibid. § 2.

⁴ *Waters v. Gooch*, 6 J. J. Marsh. 586.

⁷ 1 Brev. Dig. p. 270, § 7. See *Harshaw v. Davis*, 1 Strob. 74.

⁸ *Ellis v. Falconer*, 1 Brev. 77.

⁵ Ibid. § 4.

⁶ 1 Dig. 445.

the day it is made returnable.¹ If the defendant be served with a copy of a different summons from that on which the subsequent proceedings are based, the judgment and all other proceedings will be set aside on motion.²

39. In New York, there is to be subjoined to the declaration in ejectment, a notice in writing by the plaintiff or her attorney, addressed to the defendant, and informing him, 1. That the declaration will be filed on some day in the then next term of the court in which the action is brought, specifying the day; or if it be served during the term of any court, that it will be filed on some day in such term, specifying the same. 2. That at the time of filing, a rule will be entered, requiring the defendant to appear and plead to such declaration within twenty days after the entry of such rule; and 3. That if he neglect to appear and plead, a judgment by default will be entered against him, and the plaintiff recover possession of the premises.³ If the lands are actually occupied, a copy of the declaration and notice is to be served personally on the defendant; or if he be absent, it is to be left with some person of proper age at his dwelling-house; if the premises are not occupied, the service is to be, either on the defendant personally, or, if he can not be found, by leaving the copy with some person of proper age, at the place of his residence. But where personal service is not made, no rule to plead can be entered without a special order of the court.⁴

40. A similar mode of service is prescribed by the statutes of Illinois⁵ and Michigan.⁶

Essoin.

41. The dilatory proceedings by *essoin*, allowed in real actions at the common law,⁷ seem never to have been admitted into practice in the United States.⁸ They were expressly abolished in Virginia

¹ 1 Brev. Dig. p. 271, § 9.

² *Williams v. Lanneau*, 4 Strob. 27.

³ 2 Rev. Stat. N. Y. p. 305, § 12.

⁴ *Ibid.* §§ 13-15.

⁵ 1 Stat. Ill. 1858, p. 215, §§ 10-12.

⁶ 2 Comp. Laws Mich. 1857, p. 1232, §§ 13-15. In Missouri, if the county court make an order for the allotment of dower, without the notice to the parties interested required by the statute, the order will be void. No presumption that such notice has been given will arise where the record is silent. *Peake v. Redd*, 14 Misso. 79.

⁷ *Ante*, ch. v., §§ 10, 11.

⁸ *Stearns, Real Act.* 2d ed. 92.

by a statute passed in 1748, and in Kentucky by an enactment adopted in 1796.¹

Imparlance.

42. Under the practice in New York prior to the substitution of the action of ejectment for the writ of dower, it was a matter of course, after the demandant had counted, to grant the defendant a special imparlance until the next term.² The Virginia statute of 1748, and the Kentucky statute of 1796, allowed one imparlance.³ Upon the subject of imparlances, Mr. Stearns says:⁴ "In our practice, an imparlance is merely a continuance of the cause to the next term of the court. And it may be with or without a saving of all exceptions to the writ. It is not (except in a few particular cases) a matter of course, or of right. The court may generally grant or refuse it, to either party, at their pleasure; not, indeed, arbitrarily, but according to a sound discretion, regulated by their own rules and the established course of practice. And that course is generally the same with us in real and personal actions. The ancient rule that a plea in abatement can not be received after a general imparlance, is recognized by our courts.⁵ And it seems that no exception to this rule is allowed, even where the commonwealth is interested, or party defendant."⁶

View.

43. We have seen that at common law a view was rarely allowed in dower *unde nihil habet*.⁷ In New York, an early statute gave the tenant a right to demand a view in cases where it was necessary.⁸ But a view was not granted as a matter of course, and in order to avail himself of this statute, the tenant was required by the courts to satisfy them by affidavit of the necessity of a view.⁹ And it was laid down as a general rule, that a view should not be granted except in cases where boundaries came in question.¹⁰ Writs

¹ Waters v. Gooch, 6 J. J. Marsh. 586.

² Haviland v. Bond, 4 John. 309. See Ostrander v. Kneeland, 20 John. 276; Vischer v. Conant, 4 Cow. 396.

³ Waters v. Gooch, 6 J. J. Marsh. 586.

⁴ Stearns, Real Act. 2d ed. 104-5.

⁵ Campbell v. Stiles, 9 Mass. 217.

⁶ Martin v. Commonwealth, 1 Mass. 347.

⁷ Ante, ch. v., § 14.

⁸ Sess. 10, ch. 50, § 21; 1 N. R. L. 79, 86.

⁹ Ostrander v. Kneeland, 20 John. 276; Vischer v. Conant, 4 Cow. 396.

¹⁰ Vischer v. Conant, 4 Cow. 396. See, also, Stearns, Real Actions, 2d ed., pp. 106, 107.

of view are abolished by the revised statutes; but any judge of the court in which the action is pending, or any other person who may be authorized to perform the duties of such judge at chambers, has power, whenever he shall think proper so to do, to order the plaintiff to deliver to the defendant a particular description of the premises demanded, in the same manner, and subject to the same provisions, as in cases where bills of particulars may be required in personal actions.¹ Views were abolished in Virginia in 1748, and in Kentucky in 1796.² In Delaware, also, it is provided by statute, that in dower no view shall be granted.³

Pleas.

44. To the writ of dower *unde nihil habet* the defendant may plead in abatement, or in bar, as at common law.⁴ It is observed by Mr. Stearns that the omission of the demandant to comply with the requisitions of the statutes relative to a demand,⁵ may give occasion to plead several pleas in abatement. 1. The demandant may commence her action without making any previous demand to have her dower assigned. 2. After a proper demand has been made, the action may be commenced before the month required by the statute has elapsed. 3. The demand, though seasonable, may not have been made upon the proper person, or upon all the persons required. And each of these exceptions may be made the subject of a distinct plea in abatement. But the first two exceptions, it seems, may be well enough comprehended in a plea of the same form without making it objectionable on the ground of duplicity.⁶

¹ 2 Rev. Stat. N. Y. p. 341, § 16.

² *Waters v. Gooch*, 6 J. J. Marsh. 586.

³ Laws Del. 1829, p. 164, § 1; Del. Rev. Code, 1852, p. 292, § 12.

⁴ Stearns, Real Act. 303. See ante, ch. v. It has been held in New York that if the tenant be an infant, he must appear and defend by guardian. *Hillyer v. Larzelere*, 9 John. 160. As to the time when the tenant must appear and plead, see *De St. Croix v. Sands*, 1 John. 327. Non-joinder of one of the tenants of the freehold as defendant, is good cause of abatement in an action of dower brought against the tenant of the freehold as such tenant only. *Ellis v. Ellis*, 4 R. I. 110. A defendant can not plead in bar the same matter which he has previously pleaded in abatement, and which has been overruled. *Coxe v. Higbee*, 6 Halst. 395.

⁵ Ante, §§ 2-6.

⁶ *Plea in abatement, no demand made one month before suing forth the writ*: And the said A. comes and says, that the said M. did not demand of him the said A. to assign and set out to the said M. her reasonable dower, of and in the messuage aforesaid, with the appurtenances, one month before the time of suing forth the

As to the third exception, the plea, under the statute of 1783,¹ should expressly aver that the person therein named had the next immediate estate of freehold or inheritance, at the husband's death. But it does not appear to be necessary to allege in what character he took the estate; whether as disseizor, abator, or alienee of the husband. But if the estate descended to several heirs, it seems the plea ought to deny that any demand had been made on either of them.² Under the statute of 1828,³ it appears that the exception for want of the demand required thereby, might be made by a plea in bar, as well as by a plea in abatement.⁴ If several tenants of distinct parcels who ought to have been sued separately are proceeded against jointly, the exception must be taken by pleading several tenure in abatement.⁵

45. *Non tenure* and *disclaimer*, by the common law, could be pleaded only in abatement;⁶ but it is laid down by Mr. Stearns that in this country, they are allowed to be pleaded in bar;⁷ and he adds, that as writs of dower, like writs of entry, can, as a general rule, be maintained only against the tenant of the freehold, it follows that these pleas, which deny that the freehold is in the tenant, are equally applicable to both actions.⁸

46. The doctrine that *non tenure* may be pleaded in bar, was determined in an early case in Maine.⁹ But now by statute in that

writ aforesaid of the said M., in manner and form as by the said writ is above supposed; and this he the said A. is ready to verify. Wherefore he prays judgment of the said writ, and that the same may be quashed, &c. Stearns, Real Act. 304; Ibid. App. No. 76.

¹ Ante, §§ 2, 3.

² *Plea in abatement, no demand upon the person who took the next immediate estate of freehold*: And the said A. comes and says, that upon the death of the said J. S., late husband of the said M., the messuage aforesaid with the appurtenances, descended to T. S. and W. S., as sons and heirs of the said J. S., and that they, the said T. and W., took and had the next immediate estate of freehold and inheritance therein, after the death of the said J. S., and that the said M. never made any demand of them, the said T. and W., or either of them, to assign and set out to her, the said M., her reasonable dower of and in the aforesaid messuage, with the appurtenances; and this the said A. is ready to verify. Wherefore he prays judgment of the writ aforesaid of the said M., and that the same may be quashed, &c. Stearns, Real Act. 304; Ibid. App. No. 77.

³ Ante, § 3.

⁴ Stearns, Real Act. 305.

⁵ Ibid.; Fosdick v. Gooding, 1 Greenl. 30. See ante, § 21; ch. v., §§ 15, 36.

⁶ Ante, ch. v., §§ 15, 16.

⁷ Stearns, Real Act. 193-4, 305.

⁸ Stearns, Real Act. 304-5; Otis v. Warren, 14 Mass. 239.

⁹ Fosdick v. Gooding, 1 Greenl. 30.

State, *non tenure* can be pleaded in abatement only.¹ In Massachusetts it has been held, that where the demand for dower is against the defendant as being in possession of the land, and there is no averment that he claims the right or inheritance, it is a good plea in bar that he is not the tenant in possession.² In Pennsylvania, it has been decided, that *non tenure* may be pleaded in bar in an action of dower.³ "The plea of *non tenure* may be pleaded in abatement," the court remarked, "as is ruled in *Seaton v. Jamison*,⁴ and so are all the authorities. But that it *must* be so pleaded, although asserted in that case, is not so clear.⁵ The plea not only goes to the present right of action, but also shows that the plaintiff can not maintain any action at any time, against the defendant, in respect of the supposed cause of action, and this is the distinguishing characteristic of a plea in bar."⁶

47. Besides these general pleas, there are several pleas in bar peculiar to the writ of dower, of which the tenant may plead more than one, by leave of the court, if his case require it.⁷ A statement of these in detail has been already given in the preceding chapter. The plea of *ne unques accouplé in loyal matrimoniè*, which is sometimes considered the general issue in this action,⁸ in our practice concludes with an *averment*, and not as pleas of the general issue usually conclude.⁹ If it conclude by tendering issue to the country,

¹ Rev. Stat. Maine, 1841, ch. 144, § 4; Rev. Stat. Maine, 1857, ch. 103, § 21; *Manning v. Laboree*, 33 Maine, 343. A brief statement of *non tenure* can not avail, unless filed within the time allowed for pleas in abatement, or by special leave of the court. *Young v. Tarbell*, 37 Maine, 509.

² *Merrill v. Russell*, 1 Mass. 469.

³ *Casporus v. Jones*, 7 Pa. St. 120.

⁴ *Seaton v. Jamison*, 7 Watts, 540.

⁵ In the subsequent case of *Jones v. Patterson*, 12 Pa. St. 149, 154, these observations occur: "The rule is, that where several are impleaded as joint tenants, a denial must be put in at the earliest moment by pleading *non tenure* in abatement; and if this opportunity be suffered to pass, the fact can not afterwards be gained." *See ante*, ch. v., § 16.

⁶ *See ante*, ch. v., § 16.

⁷ *Catlin v. Ware*, 9 Mass. 218.

⁸ *Robins v. Crutchley*, 2 Wils. 128. *See ante*, ch. v., §§ 20-24.

⁹ *Plea in bar ne unques accouplé in loyal matrimoniè*: And the said A. comes and says, that the said M. ought not to have her dower of the tenements aforesaid, [or, *the said messuage*,] with the appurtenances, as having been the wife of the said J. S., because, he says, that the said M. never was accoupled, [or, *never was joined*] to the said J. S. deceased, in lawful matrimony, and this the said A. is ready to verify. Wherefore he prays judgment if the said M. ought to have her dower of the tenements aforesaid, [or, *the said messuage*,] with the appurtenances, &c. *Stearns, Real Act. App. No. 78.*

it is bad on demurrer.¹ And the demandant, in her replication, affirms a marriage at a particular time and place, and concludes to the country.²

48. The plea *ne unques seisiè que dower*,³ is also allowed in our practice.⁴ But the defence of joint tenancy, when allowed, although it goes to the seizin of the husband, must be specially pleaded, and can not be given in evidence under this plea.⁵ And it is not competent for the tenant to show that the demandant's husband, under whom he claims, was only colorably seized, by virtue of a deed made to defraud the creditors of his grantor.⁶ A plea that the husband did not die seized, is immaterial, and no bar to the action, except in those States where a conveyance by the husband alone defeats the right of dower.⁷ Where the defendant appears and denies the plaintiff's right, he thereby claims to be tenant of the freehold, and can not set up title in a mere stranger under whom no one is claiming the premises.⁸

49. Where land is devised upon a condition subsequent, the non-performance of the condition authorizes the heirs of the testator to enter upon the land and thus destroy the devise; but until the entry, those holding under the devisee are entitled to the land. Therefore, to a petition for the assignment of dower by the widow of a devisee of land devised upon condition, a plea alleging as a defence, the non-performance of the condition, but not showing that the defendant is an heir of the testator, is bad.⁹

¹ *Freeman v. Freeman*, 39 Maine, 426.

² *Replication taking issue*: And the said M. says, that she ought not, by reason of anything in the plea aforesaid of the said A. above alleged, to be barred from having her reasonable dower in the tenements aforesaid, [or, *the said messuage*,] with the appurtenances, because, she says, that she, the said M., on, &c., was accoupled [or, *was joined*,] to the said J. S. deceased, in lawful matrimony, to-wit, at, &c., and this she prays may be inquired of by the country, &c. *Stearns, Real Act. App. No. 79.* See *Freeman v. Freeman*, 39 Maine, 426. ³ *Ante*, ch. v., § 19.

⁴ *Plea in bar ne unques seisiè que dower*: And the said A. comes and says, that the said M. ought not to have her dower of the messuage aforesaid, with the appurtenances, of the endowment of the said J. S., heretofore the husband of the said M., because, he says, that the said J. S. was not, on the day on which he married the said M., or ever after, seized of such estate of and in the said messuage, with the appurtenances, whereof she demands dower, that he could endow the said M. thereof. And of this the said A. puts himself upon the country, &c. *Stearns, Real Act. App. No. 80.* See *Sheppard v. Wardell*, *Coxe (N. J.)*, 452.

⁵ *Stearns, Real Act.* 309.

⁶ *Kimball v. Kimball*, 2 *Greenl.* 226.

⁷ *Taylor v. Brodrick*, 1 *Dana*, 345. See *Coxe v. Higbee*, 6 *Halst.* 395.

⁸ *Evans v. Evans*, 29 *Pa. St.* (5 *Casey*), 277. ⁹ *Throp v. Johnson*, 3 *Ind.* 343.

50. The tenant is also permitted to plead that the husband of the demandant is still alive,¹ to which the demandant may reply as in the English practice.² We have seen that at common law this issue was to be tried by *witnesses*.³ This mode of trial was permitted in this instance as a special favor to the demandant, that the tenant might not delay the decision, as he would be able to do, if this issue were to be tried by a jury. In the United States the issue as to the death of the husband, is to be tried by a jury, like all other issues of fact.⁴

51. If dower has been already assigned out of the lands in question, and accepted by the widow, this constitutes a defence to the action, and may be plead in bar.⁵ It is not necessary to set forth an assignment by deed, nor even in writing; an assignment *in pais* being sufficient, notwithstanding the Statute of Frauds.⁶

¹ *Plea that the husband is living*: And the said A. comes and says, that the said M. ought not to have her dower of the tenements aforesaid, with the appurtenances, because, he says, that the said J. S., of whose endowment the said M. demands the same, is surviving and in full life, to wit, at, &c.; and this he is ready to verify. Wherefore, he prays judgment if the said M. ought to have her dower of the said tenements, with the appurtenances, &c. Stearns, Real Act App. No. 81.

² *Replication affirming the death of the husband*: And the said M. says, that she ought not, by reason of anything in the plea aforesaid of the said A. above alleged, to be barred from having her reasonable dower in the tenements aforesaid, with the appurtenances, because, she says, that the said J. S., her said husband, of whose endowment she demands the same, died at, &c., on the tenth day of, &c., and this she prays may be inquired of by the country, &c. Stearns, Real Act. App. No. 82. See ante, ch. v., § 31.

³ Ante, ch. v., § 31.

⁴ Stearns, Real Act. 308.

¶ ⁵ *Plea that the tenant has already assigned dower*: And the said A. comes and says, the said M. her action aforesaid thereof against him ought not to have, because, he says, that he, the said A., after the death of the said J. S., assigned and set out to the said M. ten acres of land, with the appurtenances, of the aforesaid thirty acres of land, to have and to hold the same to the said M. for the term of her life, as her dower, accruing to her of and in the aforesaid thirty acres of land, with the appurtenances; to which said assignment the said M. assented and agreed; and this the said A. is ready to verify. Wherefore he prays judgment if the said M. her aforesaid action thereof against him ought to have, &c. Stearns, Real Act. App. No. 83.

Replication denying the assignment, and taking issue: And the said M. says, that by reason of anything in the plea aforesaid of the said A. above alleged, she ought not to be barred from having her aforesaid action thereof against him, because, she says, that the said A. did not assign and set out to her, the said M., the aforesaid ten acres of land, with the appurtenances, as the dower of her the said M., accruing to her of the aforesaid thirty acres of land, as the said A. in his plea aforesaid hath above alleged. And this she prays may be inquired of by the country, &c. Stearns, Real Act. App. No. 84. See ante, ch. iv.; ch. v., §§ 32-34; post, ch. xxvii.

⁶ Conant v. Little, 1 Pick. 189; Johnson v. Morse, 2 N. H. 48; Baker v. Baker, 4 Greenl. 67; Pinkham v. Gear, 3 N. H. 163. See ante, ch. iv., §§ 3-5.

52. A relinquishment of dower by the wife must be pleaded in bar by the tenant, and can not be given in evidence under any other issue.¹ And it has been held that a private examination and acknowledgment of the wife must be averred.² A plea that the demandant *agreed* to release her dower, is bad on demurrer.³ So, also, is a plea that she did release it, without an averment that it was by deed.⁴ So a plea that demandant released her dower in a part of the estate to *one* tenant in common, *virtute cuius*, the share of the other tenant is released from her claim, is bad.⁵ The demandant, in her reply, must negative the terms of the plea. But if the plea set forth a release of dower, with a profert of the deed, it seems the demandant, if she deny the execution of it, may, upon *oyer* reply *non est factum*, generally; or if she admit the execution of the instrument, and only deny the sufficiency of it to bar her action, she may crave *oyer* of it, and demur.⁶

53. In New Jersey, a plea that a devise to the wife was intended to be in lieu of dower, is good on demurrer, without stating that it was so expressed in the will.⁷ In Indiana, in an action for dower against a purchaser from the husband, he answered, alleging that the husband had made a will, whereby he devised land to the plaintiff in lieu and bar of dower; that the will had been duly proved more than one year before the commencement of the suit; that though its contents were fully known to the widow at the date of probate, she did not within one year thereafter elect to have her dower, but on the contrary elected to take under the will. It was held, that under the statute of 1843,⁸ the facts stated in the answer constituted a bar to the action.⁹

54. A plea alleging that the demandant is barred of her dower by a decree rendered in a previous proceeding between the same parties, but which fails to set out the terms of the decree, is bad, as averring a mere conclusion of law.¹⁰

55. In Missouri, under the statute of 1825, the wife is not barred

¹ For a form of the plea applicable under the Massachusetts statute, see Stearns, Real Act. App. No. 85. A privy examination of the wife is not required in that State. Post, ch. xiii., § 2.

² Tuthill v. Townley, Cox, 242.

³ White v. White, 1 Harr. 202.

⁴ Ibid.

⁵ Ibid.

⁶ Stearns, Real Act. 309.

⁷ White v. White, 1 Harr. 202. See post, ch. xvi.

⁸ Ind. Rev. Stat. 1843, ch. 28, §§ 101, 102.

⁹ McCarty v. Roberts, 8 Ind. 150.

¹⁰ Throp v. Johnson, 3 Ind. 343

by the fact that the husband owed debts at the date of his deed, or time of his death, unless the claims of creditors be properly enforced. A third person can not set up the debts as a bar to the action for dower.¹

56. A plea that the defendant is a purchaser for a valuable consideration without notice, is not a good defence.²

57. In several of the States, elopement and adultery by the wife will bar her dower,³ and the tenant may avail himself of this defence by plea.⁴

58. The plea of *detinue of charters*, was frequently resorted to in the ancient English practice,⁵ but under our system of laws providing for the registration of titles, and enabling the heir to ascertain with convenient certainty the lands of which the ancestor was seized during the coverture, it has fallen into disuse, and may be regarded as obsolete.⁶

59. The plea of *tout temps prist*,⁷ as it goes more particularly to the claim for damages, will be considered in connection with that subject.⁸

60. In ejectment, under the New York practice, the defendant may demur to the declaration, as in personal actions; but in pleading he is restricted to the general issue, which shall be that the defendant is not guilty of unlawfully withholding the premises claimed by the plaintiff, as alleged in the declaration; and the filing of such demurrer, or plea, is to be deemed an appearance in the cause. Upon such plea, the defendant may give in evidence any matter, which, if pleaded in the former action of dower, would have barred the action of the plaintiff.⁹ These provisions of the New York statute have been adopted in Michigan¹⁰ and Illinois.¹¹

The verdict.

61. With regard to the verdict in the action of dower, no particular remarks seem to be required. As in all other cases, it should

¹ Thomas v. Hesse, 34 Misso. 13.

² Ridgway v. Newbold, 1 Harring. 385; Larrowe v. Beam, 10 Ohio, 498; Campbell v. Murphy, 2 Jones, Eq. 357. See post, ch. vii., §§ 32-40.

³ See post, ch. xviii.

⁴ Ante, ch. v., § 25.

⁵ Ante, ch. v., §§ 39-43.

⁶ Stearns, Real Act. 311; 1 Washb. Real Prop. 2d ed. 196, § 3.

⁷ See ante, ch. v., §§ 44-48.

⁸ Post, ch. xxv., §§ 14-19.

⁹ 2 Rev. Stat. N. Y., p. 306, §§ 22, 23.

¹⁰ 2 Comp. Laws Mich. 1857, p. 1233, §§ 22, 23.

¹¹ 1 Stat. Ill. 1858, p. 216, § 17.

conform to the pleadings, and distinctly find all the material points in issue between the parties. But if the substance of the issue be found for the demandant, she will be entitled to judgment, although all the circumstances are not particularly found.¹ So the verdict will be sustained though there be some irregularity in the pleadings.²

62. If the jury find that the husband of the plaintiff did not die seized, and return, also, the annual value of the premises at the time of the alienation, the latter part of the finding will be treated as surplusage; and upon a *scire facias* by the plaintiff demanding seizin of dower, she will be entitled to recover as if the judgment had been rightly and fully entered.³

63. Where there are several defendants in an action for dower, a verdict in favor of one defendant, upon his separate plea, will not avail another defendant, against whom a judgment by default has been rendered.⁴

64. In South Carolina, if the issue submitted to the jury be as to the marriage of the demandant and the seizin of her husband during the coverture, they should pass upon that issue alone; and if the verdict be in her favor, a writ will issue to commissioners to make the assignment of dower in conformity to the statute. Where the jury in such a case give a sum of money in lieu of dower, the verdict will be set aside and a new trial granted.⁵

65. Where elopement and adultery of the wife are interposed as a defence, the jury, if they find her guilty as charged, should also find whether she had ever been reconciled to her husband;⁶ otherwise a repleader must be awarded.⁷

The judgment.

66. The judgment for the demandant in an action or writ of dower, where she has obtained a verdict, is, "that the said M. recover her seizin against the said A. of the said third part of the tenements aforesaid, with the appurtenances, and her damages

¹ Stearns, Real Act. 311. See ante, ch. v., § 50.

² Smith v. Paysenger, 2 Mills, (Con. Court) 59. See Galbraith v. Green, 13 S. & R. 85, 94.

³ Shirtz v. Shirtz, 5 Watts, 255. See Benner v. Evans, 3 Penn. 454; Leineweaver v. Stoeve, 17 S. & R. 297; post, ch. xxv., §§ 48, 49.

⁴ Lecompte v. Wash, 9 Misso. 551.

⁵ Peay v. Picket, 1 N. & M. 16.

⁶ See post, ch. xviii.

⁷ Lecompte v. Wash, 9 Misso. 551.

assessed by the jury in form aforesaid, at the sum of dollars, together with her costs."¹ In New Hampshire, it is provided by statute, that judgment shall be rendered for the demandant that she recover "seizin of such part of a certain with the appurtenances, as will produce a yearly income equal to one-third part of the yearly income thereof on the day of ."² In Rhode Island, the judgment must set forth the manner in which the plaintiff is to be endowed.³ In New York,⁴ Virginia,⁵ Illinois,⁶ and Michigan,⁷ the judgment for the plaintiff is to the effect that she recover possession of the premises according to the verdict of the jury, if there be a verdict; or if the judgment be by default, or on demurrer, according to the description thereof in the declaration. In Missouri,⁸ and Kansas,⁹ if the judgment be by default, the court is to hear the proofs and allegations of the demandant, or impanel a jury for that purpose; and if it be found, upon such proceedings, or on the trial of the issue, that the demandant is entitled to dower, the court or jury shall determine in what proportion, and the court shall thereupon render judgment that she be seized of her dower accordingly, for and during her natural life, and that she recover the damages that may be assessed.¹⁰

67. The method adopted for setting out the dower after judgment has been rendered in favor of the widow, varies in the different States. In Massachusetts,¹¹ and Maine,¹² a writ of seizin issues, requiring the proper officer to cause it to be assigned by three disinterested persons appointed for that purpose. In Delaware, the court, instead of awarding a writ for delivering seizin, may appoint five impartial and disinterested freeholders of the county to lay off the dower, and also to assess the damages.¹³ In New Hampshire,

¹ Stearns, Real Act. 311. The legality of the proceedings can not be contested by one having no interest to be affected thereby. *Purinton v. Pierce*, 38 Me. 447. A final order of the court can not be set aside at a subsequent term merely on the ground of error. *Peake v. Redd*, 14 Misso. 79.

² N. H. Comp. Stat. 1853, p. 521, § 5.

³ Rev. Stat. R. I. 1857, p. 504, § 9.

⁴ 2 Rev. Stat. N. Y. p. 308, § 33.

⁵ Code Va. 1849, p. 561, § 29.

⁶ 1 Stat. Ill. 1858, p. 217, § 27.

⁷ 2 Comp. Laws Mich., p. 1235, § 32.

⁸ 1 Rev. Stat. Misso. 1855, p. 675, § 31.

⁹ Comp. Laws Kansas, 1862, p. 481, § 20.

¹⁰ For a further consideration of the subject of the form and effect of the judgment, and its divisible character as to the dower and damages, see post, ch. xxv., §§ 48, 49.

¹¹ Gen. Stat. Mass. p. 697, § 7.

¹² Rev. Stat. Maine, 1857, p. 607, § 25.

¹³ Laws Del. 1829, p. 164, § 1; Del. Rev. Code, 1852, p. 292, § 14.

the officer to whom the writ of seizin is directed, causes the dower to be set off by three discreet and disinterested men of the neighborhood.¹ In Rhode Island, the assignment is to be made by three disinterested commissioners to be appointed by the court.² In South Carolina, the court orders a writ of admeasurement of dower to be issued, directed to five persons, two to be nominated by each party, and one by the court, commanding them, or a majority of them, to assign the dower. If any defendant shall refuse to nominate commissioners, the court is to make the appointment.³ In Missouri,⁴ and Kansas,⁵ the court appoints three competent persons, as commissioners to admeasure the dower. In New York,⁶ Virginia,⁷ Michigan,⁸ Illinois,⁹ and Wisconsin,¹⁰ where an action of ejectment is brought to recover dower before it has been admeasured, and the plaintiff recovers, provision is made for its assignment by commissioners to be appointed by the court.

68. In Maine, *scire facias* lies to obtain a writ of seizin of dower, where judgment has been rendered, and the time for issuing such writ has expired. And where a widow institutes her suit for dower, and marries before entry of action, and the defendant does not object to the non-joinder of the husband, the objection comes too late on a *scire facias* founded on the judgment.¹¹ In Pennsylvania, if a judgment in dower be recovered by husband and wife, and a *scire facias* issue at the suit of the wife, reciting that she is now sole, and this is not traversed in the plea, the judgment is well entered for the plaintiff on a plea of *nul tiel record*.¹²

Collusive recovery of dower.

69. In several of the States it is declared by statute, that no heir who was under age at the time dower was assigned to the widow out of the lands of his ancestor, by his guardian, or by judg-

¹ N. H. Comp. Stat. 1853, p. 521, § 6.

² Rev. Stat. R. I. 1857, p. 504, § 11.

³ 1 Brev. Dig. p. 270, § 7; p. 271, § 9.

⁴ 1 Rev. Stat. Misso. 1855, p. 675, § 31.

⁵ Comp. Laws Kansas, 1862, p. 481, § 20.

⁶ 2 Rev. Stat. N. Y. pp. 311, 312, § 55.

⁷ Code Va. 1849, p. 561, § 29.

⁸ 2 Comp. Laws Mich. 1857, p. 1240, § 59.

⁹ 1 Stat. Ill. 1858, p. 220, § 45.

¹⁰ Rev. Stat. Wis. 1858, p. 842, § 26.

¹¹ Walker v. Gilman, 45 Maine, 28.

¹² Shaw v. Boyd, 12 Pa. St. (2 Jones), 215.

ment by default or collusion against such guardian, shall be precluded, when he comes of age, from recovering the seizin of his ancestor from such widow, unless she can show herself entitled to the dower.¹ This is the case in Virginia,² New York,³ New Jersey,⁴ Kentucky,⁵ Ohio,⁶ Missouri,⁷ Michigan,⁸ Wisconsin,⁹ Minnesota,¹⁰ Kansas,¹¹ and Oregon.¹²

Remedy of the widow where she has lost her dower by default.

70. In New Jersey¹³ and Kansas,¹⁴ it is provided that if the widow be impleaded and lose her dower by default, the default shall not be so prejudicial to her but that she may institute new proceedings to establish her right thereto. In New Jersey the statute prescribes the form of the writ to be issued in her behalf; and it directs that to this writ the tenant shall have his exception to show that she had no right to be endowed; and if he can verify his exception, he shall go quit; and if not, the widow shall recover the land whereof she was before endowed. In Virginia¹⁵ and New York,¹⁶ similar enactments were formerly in force.

¹ See post, ch. xxviii.

² Code Va. 1849, p. 476, § 13. This provision was first adopted in Virginia in 1785. 12 Hen. Stat. 163.

³ 1 Rev. Stat. N. Y., p. 743, § 24. Adopted in the statute of 1787, § 5. 1 Laws N. Y. (1813), p. 57.

⁴ Nixon's Dig. p. 209, § 6.

⁵ 2 Ky. Rev. Stat. by Stanton, p. 27, § 11.

⁶ 1 Rev. Stat. Ohio, p. 521, § 13.

⁷ 1 Rev. Stat. Misso. 1855, p. 677, § 40.

⁸ 2 Comp. Laws Mich., p. 855, § 29.

⁹ Rev. Stat. Wis. 1858, p. 549, § 29.

¹⁰ Stat. Minn. 1858, p. 410, § 29.

¹¹ Comp. Laws Kansas, 1862, p. 483, § 29.

¹² Stat. Oregon, 1855, p. 408, § 29.

¹³ Nixon's Dig. p. 209, § 6.

¹⁴ Comp. Laws Kansas, 1862, p. 484, § 35.

¹⁵ Va. Stat. 1785, § 4; 12 Hen. Stat. p. 164; 1 Rev. Code 1819, ch. 107, § 8.

¹⁶ N. Y. Stat. 1787, § 5; 1 Laws N. Y. (1813), pp. 57-8.

CHAPTER VII.

REMEDY IN EQUITY FOR THE RECOVERY OF DOWER.

§ 1-9. Origin and grounds of equity jurisdiction in cases of dower.	22-25. Mode of procedure where the title is disputed.
10-15. Jurisdiction of courts of equity in cases of dower in the United States.	26-31. Cases in which courts of equity have exclusive jurisdiction.
16-18. What averments the bill should contain.	32-40. Equitable defences.
19-21. Parties.	41-46. Assignment of dower by courts of equity.
	47. Costs.

Origin and grounds of equity jurisdiction in cases of dower.

1. IT appears that as early as the reign of Elizabeth, courts of equity had assumed some kind of remedial jurisdiction of claims for dower. At the present day, these courts are regarded as possessing, to a great extent, concurrent jurisdiction with courts of law as to dower; but it seems that until a comparatively recent period, the jurisdiction exercised by them was merely auxiliary in its character. The earlier cases in which courts of equity entertained bills relative to dower, proceeded upon the common equitable ground of paving the way to the establishment of a legal right, by furnishing a discovery of matters essential to the prosecution of that right; or removing impediments which might be set up, against conscience, to obstruct the success of the claimant; and this relief was gradually extended, probably upon the principle that when a court of equity has once obtained jurisdiction over the subject matter, by reason of an equitable question, it will proceed to do complete justice between the parties, and to give the whole relief to which they are entitled; subject, as to any questions which may arise of purely legal cognizance, to the result of a decision by the proper tribunal.¹

2. The earliest reported case upon this subject appears to be *Wild v. Wells*,² determined in 1583, in which a bill to have dower set out, and for arrears, was entertained in chancery; and it seems

¹ Park, Dow. 317, 318.

² *Wild v. Wells*, 1 Dick. 3; Toth. 145.

to have been considered that the court might set out the dower by commission, and an order *nisi* was made accordingly. From the meagre notes of this case in the books, it is impossible to gather what the equity was founded upon; unless, perhaps, upon the ground that the claim of arrears involved a species of account, and that the court, having thus obtained a jurisdiction of the subject, would proceed to decree complete relief, upon an admission, probably, of the legal title.

3. In *Dolin v. Coltman*,¹ which arose a hundred years later, a wife joined with her husband in a mortgage, and levied a fine to the intent to bar her dower; and in consideration thereof, the husband agreed that the wife should have the equity of redemption; but he subsequently made two additional mortgages upon the estate. The settlement of the equity of redemption upon the wife was adjudged fraudulent as against the subsequent mortgagees; but as the wife had levied the fine, relying upon the validity of the settlement, a decree was entered restoring her to her title of dower as against the subsequent mortgagees; "and whereas the mortgagees pressed that the decree might only be, that she should enjoy her dower notwithstanding the fine; the court thought it unreasonable in this case to put the wife to her writ of dower; because they might convey away the estate, and she not know against whom to bring her writ of dower; and therefore decreed the dower to her." This decree seems to have proceeded on the admission by the mortgagees of the right of the wife to dower, and the probability of difficulty in the prosecution of her right at law.²

4. In *Shute v. Shute*,³ and in *Wallis v. Everard*,⁴ the court refused to entertain bills for dower, for the reason that no impediment was shown in the way of proceeding at law. In the former case, the master of the rolls said: "As to the dower, whether you are entitled to it, go to law, there being no impediment, and therefore as to that the bill must be dismissed." In *Moor v. Black*,⁵ the plaintiff charged in her bill that her husband's ancestor died seized of several

¹ *Dolin v. Coltman*, 1 Vern. 294, (1684). See vol. i., ch. xxii., § 6.

² Mr. Park says of this case, that "but little reliance can be placed on the vague and unsatisfactory report in *Vernon*, and the case is inconsistent with itself, as it immediately before states that the husband and wife were both living." Park, Dow. 319.

³ *Shute v. Shute*, Prec. Ch. 111, (1700).

⁴ *Wallis v. Everard*, 3 Ch. Rep. 161, (1708).

⁵ *Moor v. Black*, Cas. temp. Talbot, 126, (1735).

estates, which, upon his death, descended, *as to one moiety*, upon her husband in fee, *who died before any partition* made, and that the defendant had *got possession of all the title deeds*, whereby she was disabled from suing for her dower at law, and therefore came into that court to have her dower assigned. A demurrer was interposed in which it was assigned for cause, that the right of dower was purely a legal right, triable by jury; and that no impediment was suggested why the demandant could not recover at law. On the argument it was insisted for the demandant that she was properly in a court of equity, not only on account of the deeds being in the hands of the defendant, without which she could not prove her title at law, but also for the reason that as the estate was in coparcenary, and no partition made, the sheriff could, upon recovery in a writ of dower, put her in possession of but a third of an undivided moiety; thus rendering it necessary to still have recourse to a court of equity to have dower set out to her; the judgment in dower not reducing it to more certainty than it was before; and that by bringing her bill, the complainant had only done at first what she would have been compelled to do at last. Against this it was objected, that although the complainant might come into a court of equity for a discovery, yet this would not entitle her to an assignment of dower under a decree of that court; that her title was merely at law, in respect of which damages were to be assessed by a jury; and that she was not entitled to the possession of the deeds as they belonged to the defendant. Lord Chancellor Talbot overruled the demurrer, observing that there was no possibility for the complainant to recover (as it appeared to him), without the assistance of the deeds; for as the husband died shortly after the estate descended to him, and before any receipt of rent, or partition made, the widow could not prove a seizin at law to entitle herself to dower.¹ He further remarked that she lay under another difficulty, as her husband's estate was complicated, and that she must come into a court of equity for partition; otherwise, the consequence would be that after judgment and execution, she must, at the end of every six months, be driven to her action against such as held jointly with her, and who received

¹ This observation is inaccurate. An actual seizin is not necessary to a title of dower. It would be sufficient to prove the seizin of the ancestor, his death, and the heirship. Park, Dow. 320, note. See vol. i., ch. xii., § 24.

the profits, for her share, and also for her damages for the detainer, which would be absurd and unreasonable.

5. In the case of *Dormer v. Fortescue*,¹ upon a question of equitable relief as to rents and profits, Lord Hardwicke incidentally remarked: "So in the case of dower, if a widow is entitled to dower, and her claim is merely upon her legal title, but can not ascertain the lands out of which she is dowable, this court will assist her to find out the lands, and the court will order her to proceed upon a particular part, and reserve the further consideration till after judgment, and if her title of dower is established, will give her profits." He added: "I will put this case: suppose a widow entitled to dower of an estate upon which a term for years was standing out, and she had her title of dower out of the reversion of the term, and she comes into this court to have it removed out of the way, they will decree her an account of the rents and profits from the time of her title accrued, and will set the term as a satisfied one out of the way; but if that term had been out of the way, and she had no need to come into this court, it would have been otherwise."

6. It will be seen from these cases, that it was for a considerable time an unsettled question as to how far courts of equity should entertain jurisdiction to give general relief where there appeared to be no obstacle to the legal remedy of the widow.² But the result of the various decisions upon the subject is, that courts of equity will entertain a general concurrent jurisdiction with courts of law in the assignment of dower in all cases,³ and this jurisdiction is now firmly established.⁴ The principle upon which this doctrine rests, is intelligible and reasonable, namely, that the widow labors under so many disadvantages at law from the embarrassments of trust terms, and from an ignorance of the titles, values, and quantities of the lands of which her husband was seized, that she ought to have every assistance that a court of equity can give her,

¹ *Dormer v. Fortescue*, 3 Atk. 130, 131, (1744).

² See, also, 1 Fonbl. Eq. book 1, ch. 1, § 3, note; *Huddleston v. Huddleston*, 1 Ch. R. 38.

³ 1 Story's Eq. § 624; Adams's Eq. *234.

⁴ 1 Roper, H. & W. 449. Mr. Park expresses some dissatisfaction with the extent to which the rule has been carried. "It may, perhaps, admit of doubt," he says, "whether the doctrine has not been carried higher than the reason of the case justifies." Park, Dow. 318.

not only in paving the way to establish her right at law, but also by giving complete relief when the right is ascertained.¹

7. This doctrine was stated in very clear and forcible terms by Lord Alvanley, when master of the rolls, in *Curtis v. Curtis*.² In that case a bill had been filed, setting forth a right of dower in the complainant, and that the defendant, as heir at law and devisee, had taken possession of the estates, and praying an account of one-third of the rents since the decease of her husband, and to be let into possession of one-third of the lands, and a decree authorizing her to hold the same for life. The defendant insisted, by answer, that the complainant was never married to the deceased, and therefore that she was not dowable. Lord Chancellor Bathurst ordered the bill to be retained for twelve months, with liberty to the complainant to bring her action at law to try her right to dower, and in case she should do so, the consideration of costs and further directions were reserved until the master should make his report; but in case she did not proceed to trial, the bill, so far as it prayed relief as to dower, was to stand dismissed. The complainant having obtained a verdict at law, and an order at the rolls (upon a bill of revivor and supplement), that the former decree should be carried into execution, and the defendant having petitioned for rehearing, the cause was reheard before Lord Alvanley upon a question as to the account of rents and profits; and it was urged in argument by counsel for the complainant, that the bill of revivor and supplement could not be dismissed without rehearing the first decree, and they insisted that "it never was suggested at the former hearing, that this bill for dower was improper; because it was perfectly understood to have been the settled practice of the court to grant commissions to assign dower where no legal impediment has been proved; nor would it have been tried but for the doubt upon the marriage." Lord Alvanley, in giving judgment, after observing that dower is a mere legal demand, and the widow's remedy *prima facie* at law, proceeded: "But the question then comes, whether the widow can not come either for a discovery of those facts which may enable her to proceed at law; and on an allegation of impediment thrown in her way in her proceedings at law,³ this court has

¹ 1 Roper, H. & W. 449; 1 Story's Eq. § 625; 4 Kent, 71, 72.

² *Curtis v. Curtis*, 2 Bro. C. C. 620.

³ In commenting upon this case Mr. Park says: "It does not appear from the report of *Curtis v. Curtis* that there were any such allegations in the plaintiff's bill;

not a right to assume a jurisdiction to the extent of giving her relief for her dower, and if the alleged facts are not positively denied, to give her the full assistance of this court, she being in conscience as well as law entitled to her dower. . . . Cases have been mentioned to show that there must be some fraud to give this court a jurisdiction, and that in the simple case of a woman claiming her dower, no such jurisdiction exists. *Dormer v. Fortescue* is also brought to show that there must be, either an infant concerned, or some particular circumstances in the case to entitle this court to proceed. Now it seems difficult to distinguish the two cases of the infant and the widow. The principle in the case of the infant is, that he is thought not conscious of his rights at law, sufficiently to enable him to proceed there, and therefore the court of equity will give him all the relief he could have had at law, and something more; for on a bill by an infant for an account, he will get the mesne profits, which would certainly be gone at law upon the death of the party. I argue in the same manner for the widow. She comes here and says, 'the law gives me dower of the estates of my husband, and the mesne profits from his death; I do not know how to proceed; for if there should turn out to be any mortgage or term of years in my way, then I must pay the costs. The defendant has all the title deeds in his hands, and knows what the estates are; his conscience is affected, and yet, instead of putting me in possession of my rights, he turns me out of doors, and keeps all the title deeds.' Now I think this argument is a strong one, on the subject of fraud and concealment on the part of the heir, in not informing the widow of all that is necessary to enable her to proceed safely at law. If, then, she comes here for a discovery of these matters which the heir withholds from her, she shall have her

on the contrary, the defendant's counsel are represented as stating that her bill did not suggest any impediment to her proceeding at law, and observing that the demand being at law, the bill should have stated some ground (as a fraud or other impediment to her trying her title at law), for coming into a court of equity. It was, however, stated at the bar by Mr. Lloyd, on the hearing of *Mundy v. Mundy*, that it appeared from the register's book, that the bill charged that the defendant well knew that the plaintiff had not any of the title deeds or writings showing what interest her husband had in the estate, but that all such deeds and writings were in the defendant's own hands; that he pretended her husband was only tenant for life; and that there were mortgages and terms for years outstanding, which he would set up against her claim if she should proceed at law. Mr. Lloyd added, that the master of the rolls relied upon these charges, and stated that the bill would not have been proper without such allegation. 2 Ves. Jr. 124." Park, Dow. 323, note.

complete relief in this court. If you deny her right to dower, the question must be tried at law;¹ but when the fact is ascertained, she shall have her relief here."

8. In the subsequent case of *Mundy v. Mundy*,² in which the widow filed her bill for dower, without charging in it any impediment to her obtaining an endowment at law, Lord Loughborough, in answer to what had been said at the bar, observed that "it is a new proposition that where there is a title at law this court can not in any shape or for any purpose, interfere. If a legal title, such as dower, is controverted, it must be made out at law. In those cases, all that the court has said, is, that dower is a legal title which must be made good at law. But this court will act in aid of the title. If it is not controverted, it is very similar to the right of a tenant in common. This court has entertained bills for partition; and the jurisdiction has been admitted in bills for dower, under some circumstances for a long time. The principle of that is just; for where parties have a common interest, they have a right to have it ascertained. That necessarily involves a species of account. If that is answered by the proceeding here, there is no occasion to send it to law, where there is a degree of intricacy and difficulty. This has had the effect of almost putting an end to writs of dower. In the course of twelve years I do not remember more than two; and they must be in the court of common pleas. But this jurisdiction is peculiarly proper on other considerations; for if she was to proceed at law, she could be opposed only by a legal bar. Now equitable bars are in daily practice."

9. So in *Pulteney v. Warren*,³ Lord Eldon, in discussing this subject, said: "I do not know a case in which the heir has claimed merely as heir an account, not stating any impediment to his recovering at law; that the defendant has the title-deeds necessary to maintain his title; that terms are in the way of his recovery at law; or other legal impediments, which do, or which may probably prevent it; upon which probability, or upon the fact, the court founds its jurisdiction. The case of the dowress is upon a principle somewhat, and not entirely, analogous to that of the heir. An indulgence has been allowed to her case upon the great difficulty of determining, *a priori*, whether she could recover at law, ignorant

¹ Post, §§ 22-25.

² *Mundy v. Mundy*, 2 Ves. Jr. 122; s. c. 4 Bro. C. C. 294.

³ *Pulteney v. Warren*, 6 Ves. Jr. 89.

of all the circumstances; and the person against whom she seeks relief, as was strongly observed by the master of the rolls in *Curtis v. Curtis*, having in his possession all the information necessary to enable her to establish her rights. Therefore it is considered unconscientious in him to expose her to all that difficulty, to which, if that information was fairly imparted, as conscience and justice require, she could not possibly be exposed." Similar views were expressed by Lord Langdale in *Strickland v. Strickland*.¹ "It was argued," he said, "that if difficulties are shown to exist, and if, from the nature of the case, it appears to be in the power of the defendant to raise those difficulties, this court will not only restrain the defendant from raising the difficulties, but will assume the whole jurisdiction over the case; and if this were so, the plaintiff might be entitled to relief on this bill. But there is no such general rule; there are, indeed, some particular cases of legal right, such as dower and partition, in which the court has assumed general jurisdiction, probably in consequence of the difficulties to which the plaintiff would be subjected in seeking to obtain complete justice at law; but in other cases, the plaintiff is to show what the difficulties are, and how they impede him in a manner contrary to equity, and his bill ought to pray to be relieved from them."²

Jurisdiction of courts of equity in cases of dower in the United States.

10. The Supreme Court of the United States, in an early case, held that courts of chancery have concurrent jurisdiction with courts of law in cases of dower.³ "According to the practice which prevails generally in England," said Chief Justice Marshall,

¹ *Strickland v. Strickland*, 6 Beav. 77, 81.

² See, also, *Mitf. Pl. Eq.* 121, 122, 123, by Jeremy, and note; *Jeremy on Eq. Juris.* b. 3, pt. 2, ch. 5, pp. 508-9; 1 *Fonbl. Eq.* 2d ed., p. 22; 2 *Lead. Cas. in Eq.* pt. 1, pp. 504-5. Mr. Park says: "In point of practice, the writer believes that bills for dower uniformly allege impediments to recovery at law, either real or supposititious, in order to attract the jurisdiction." *Park, Dow.* 327. Mr. Roper makes the following suggestion: "It is usual for the widow to insert a general charge in her bill of outstanding terms, &c., which the heir or tenant intends to set up to defeat her legal proceedings, and prudence seems to require that this practice should not be forsaken." 1 *Roper, H. & W.* 450.

³ *Herbert v. Wren*, 7 Cranch, 370; 2 Cond. U. S. R. 534. To the same effect is *Powell v. Monson Man. Co.*, 3 Mason, 347, 459.

“ courts of equity and courts of law exercise a concurrent jurisdiction in assigning dower. Many reasons exist in England in favor of this jurisdiction, one of which is, that partitions are made, and accounts are taken in chancery in a manner highly favorable to the great purpose of justice.” This is the prevailing doctrine, and is recognized in numerous decisions made in the courts of the several States.

11. In New York, in *Hazen v. Thurber*,¹ the jurisdiction was exercised without objection. In *Swaine v. Perine*,² the chancellor said: “ This is a bill for dower; and the bill charges that the defendant is the only child and heir at law of Simon Swaine, her late husband, and that she has possession of the title-deeds, and refuses to assign dower. The jurisdiction of the court is not questioned by the defendant; and that jurisdiction appears to be well-established in cases where no legal bar or impediment is raised to the title.” In *Badgley v. Bruce*,³ this doctrine was re-affirmed after careful consideration of the subject. “ It was a question of doubt for some time,” observed the chancellor, “ how far a court of equity would take jurisdiction of a case for the assignment of dower. The jurisdiction of the court of chancery in England had long been sustained where there was any difficulty in the way of the widow’s proceeding at law; as an outstanding term, the want of information as to the title, or the want of means to establish the title of the husband in a court of law, in consequence of the possession of the deeds by the heirs, &c. And finally, it was decided, in the case of *Mundy v. Mundy*,⁴ that a demurrer to a bill for dower could not be sustained, although the bill did not contain any allegation that there was an impediment to the complainant’s remedy, in an action at law. It may therefore be considered as settled in England that the court of chancery has concurrent jurisdiction with courts of law in suits for the assignment of dower. . . . Chancellor Kent also considered the case of *Swaine v. Perine* as settling the jurisdiction of this court in the same way.”⁵

¹ *Hazen v. Thurber*, 4 John. Ch. 604.

² *Swaine v. Perine*, 5 John. Ch. 482.

³ *Badgley v. Bruce*, 4 Paige, 98.

⁴ *Mundy v. Mundy*, 2 Ves. Jr. 122; ante, § 8.

⁵ 4 Kent, 72. Chancellor Kent says: “ The jurisdiction of chancery over the claim of dower, has been thoroughly examined, clearly asserted, and definitively established.” 4 Kent, 71. See, also, *Hale v. James*, 6 John. Ch. 258; *Russell v. Austin*, 1 Paige, 192; *Bell v. Mayor of N. Y.* 10 Paige, 49.

12. And after the jurisdiction of a court of equity has once attached, and dower has been assigned under a decree made therein, the surrogate has no power to order the lands assigned for dower to be sold with other lands of the deceased husband, for the payment of his debts, notwithstanding the fact that authority is given by statute to award to the widow compensation in money for her dower.¹

13. In New Jersey, although at one time it was a controverted point whether courts of equity possessed jurisdiction in dower,² the rule is now definitely settled in accordance with the English doctrine. The subject was considered in *Hartshorne v. Hartshorne*,³ where the chancellor said: "It is insisted that this court has no jurisdiction in dower, and that in New Jersey the remedy is exclusively in the common law courts. Whatever difference of opinion on this subject might at one time have existed, I consider it settled at this day, that in relation to both dower and partition, the courts of law and equity hold a concurrent jurisdiction. . . . It is indispensable in many cases for the sake of discovery by the oath of the defendant as to the property, its nature, and the incumbrances upon it, and sometimes for an account of the rents and profits, that the jurisdiction of this court should be maintained."

14. So in Pennsylvania,⁴ Virginia,⁵ Maryland,⁶ Kentucky,⁷ South

¹ *Lawrence v. Miller*, 2 Comst. 245; *Lawrence v. Brown*, 5 N. Y. (1 Seld.) 394; overruling *Lawrence v. Miller*, 1 Sand. S. C. 516.

² See *Harrison v. Eldridge*, 2 Halst. 392; 4 Kent, 72.

³ *Hartshorne v. Hartshorne*, 1 Green Ch. 349. See, also, *Wright v. Wright*, 4 Halst. Ch. 143; *Hinchman v. Stiles*, 1 Stockt. Ch. 361, 454; *Opdyke v. Bartles*, 3 Stockt. Ch. 133; *Rockwell v. Morgan*, 2 Beasl. Ch. 119, 384.

⁴ *Purdon's Dig. by Brightly*, p. 363, § 7; p. 402, § 8.

⁵ *Boyden v. Lancaster*, 2 P. & H. 198; *Blunt v. Gee*, 5 Call, 481; *Grayson v. Moncure*, 1 Leigh, 449; *Tod v. Baylor*, 4 Leigh, 498; *Blair v. Thompson*, 11 Gratt. 441; Code Va. 1849, p. 475, §§ 9, 10. The Va. Stat. of 1727, authorized the widow to proceed by bill in equity for dower. 4 Hen. Stat. 227.

⁶ *Wells v. Beall*, 2 Gill & J. 468; *Steiger v. Hillen*, 5 Gill & J. 133; *Sellman v. Bowen*, 8 Gill & J. 50; *Scott v. Crawford*, 11 Gill & J. 365; *Darnall v. Hill*, 12 Gill & J. 388; *Abercrombie v. Riddle*, 3 Md. Ch. Dec. 320; *Chase's case*, 1 Bland Ch. 206; *Kiddall v. Trimble*, 1 Md. Ch. Dec. 143; 1 Md. Code, p. 77, § 30.

⁷ *Kendall v. Honey*, 5 Mon. 282; *Jones v. Todd*, 2 J. J. Marsh. 359; *Stevens v. Smith*, 4 Ibid. 64; *Robertson v. McDaniel*, 5 J. J. Marsh. 11; *Marshall v. Anderson*, 1 B. Mon. 198; *Gray v. Sparrow*, 3 B. Mon. 110; *McElroy v. Wathen*, 3 B. Mon. 135; *Garton v. Bates*, 4 B. Mon. 366; *Lawson v. Morton*, 6 Dana, 471; *Wall v. Hill*, 7 Dana, 173.

Carolina,¹ North Carolina,² Alabama,³ Missouri,⁴ Arkansas,⁵ Mississippi,⁶ Florida,⁷ Tennessee,⁸ Delaware,⁹ Ohio,¹⁰ Iowa,¹¹ Illinois,¹² and Indiana,¹³ the jurisdiction of courts of equity in proceedings for dower, is well established.¹⁴ In Vermont, courts of probate have exclusive jurisdiction in assigning dower; but the widow may go into equity to have incumbrances removed from the estate of which she is dowable, or for a proper apportionment of the amount due thereon.¹⁵

15. It is settled, also, in Maryland, that a court of equity will order an assignment of dower in a creditor's suit, upon the petition of the widow of the debtor.¹⁶ And where, on a bill in South Carolina, to marshal the assets of a testator against his executrix, who was also his widow, the real estate of the testator had been sold under an order of court before any claim of dower was made by the widow, it was held that she might come in on petition before distribution

¹ *Miller v. Cape*, 1 Desaus. 110; *Miller v. Miller*, Ibid. 111; *Keith v. Trapier*, 1 Bail. Eq. 63; *Mey v. Mey*, 1 Bail. L. 277, note; *Gordon v. Stevens*, 2 Hill, Ch. 429; *Keckley v. Keckley*, Ibid. 250; *Bullock v. Griffin*, 1 Strobh. Eq. 60; *Tennant v. Stoney*, 1 Rich. Eq. 222; *Gibson v. Marshall*, 5 Rich. Eq. 254; *Woodward v. Woodward*, 2 Rich. Eq. 23; *Rickard v. Talbird*, Rice, Eq. 158.

² *Campbell v. Murphy*, 2 Jones, Eq. 357; *Whitehead v. Clinch*, 1 Murph. 128.

³ *Beavers v. Smith*, 11 Ala. 20; *Johnson v. Elliott*, 12 Ala. 112; *Potier v. Barclay*, 15 Ala. 439; *Fry v. Merch. Ins. Co.*, Ibid. 810; *Shelton v. Carroll*, 16 Ala. 148; *Edmondson v. Montague*, 14 Ala. 370; *Francis v. Garrard*, 18 Ala. 794; *Thrasher v. Pickard*, 23 Ala. 616; *Owen v. Slatter*, 26 Ala. 547; *Slatter v. Meek*, 35 Ala. 528.

⁴ *Davis v. Davis*, 5 Misso. 183.

⁵ *Menifee v. Menifee*, 3 Eng. 9; *Crittenden, Ex parte*, 5 Eng. 333; *Crittenden v. Woodruff*, 6 Eng. 82; *Gillespie v. Somerville*, 3 Stew. & Port. 447.

⁶ *Turner v. Morris*, 27 Missis. 733; *Harper v. Archer*, 28 Missis. 212. See *Pickering v. Wilson*, 13 S. & M. 691.

⁷ *Chaires v. Shepard*, 7 Flor. 77.

⁸ Code Tenn. 1858, § 2407.

⁹ *Ridgway v. Newbold*, 1 Harring. 385; *Layton v. Butler*, 4 Harring. 507.

¹⁰ 1 Rev. Stat. Ohio, by Swan & Critchf., p. 520, § 9. See 63 Ohio Laws, p. 33.

¹¹ *Gano v. Gilruth*, 4 G. Greene, 453; *Phares v. Walters*, 6 Clarke, 106.

¹² *Blain v. Harrison*, 11 Ill. 384; *Turney v. Smith*, 14 Ill. 242; *Osborne v. Horine*, 17 Ill. 92; 1 Stat. Ill. 1858, p. 154, § 19.

¹³ *Martin v. Coult*, 4 Ind. 535; *Wells v. Sprague*, 10 Ind. 305.

¹⁴ But a court of equity has no power to order an assignment of dower in lands lying in another State. *Blunt v. Gee*, 5 Call, 481.

¹⁵ *Danforth v. Smith*, 23 Verm. 247. See, also, *London v. London*, 1 Humph. 1; *Thompson v. Cochran*, 7 Humph. 72. As to proceedings by the widow to redeem incumbered estates, and for dower therein, see vol. i., ch. xxiii., and post, § 28.

¹⁶ *Mildred v. Neill*, 2 Bland, Ch. 354, note; *Ewing v. Ennalls*, Ibid. 356, note; *Watkins v. Worthington*, Ibid. 509, 512; *Simmons v. Tongue*, 3 Bland, Ch. 341, 344.

of the funds, and claim the value of her dower out of the proceeds of the sale.¹ But where, upon a bill filed to restrain a widow from proceeding at law to recover her dower, the complainant fails in defeating her claim, the court will not proceed to the assignment of the dower, but will dismiss the bill upon the merits, and leave the defendant to pursue her remedy at law.²

What averments the bill should contain.

16. The bill should show the marriage of the demandant with the person whose widow she claims to be, his death, and either that he was seized during coverture of the land of which dower is claimed, or that he was prevented by fraud from becoming so seized.³ We have seen, that it is usual, also, to insert a general allegation of some existing impediment to complete relief in a court of law.⁴ And in those States where proceedings for dower can not be instituted until after a demand, it is essential that the bill should show that this statutory requisite has been complied with.⁵ In other States the allegation of a demand is unnecessary, except as it may affect the claim to damages.⁶

17. It is not indispensable that a bill for dower should negative every fact which may possibly exist inconsistent with the claim.

¹ *Tennant v. Stoney*, 1 Rich. Eq. 222. In Alabama, an alienee of the husband may resort to equity to have dower assigned to the widow. *Shelton v. Carroll*, 16 Ala. 148. And a purchaser who has contracted for "a good and lawful title," may, after the death of his vendor, come into equity to have the value of the dower claim of the widow deducted from the unpaid purchase money. *Thrasher v. Pinckard*, 23 Ala. 616. See ante, ch. i., §§ 3, 4.

² *Sandford v. McLean*, 3 Paige, 117. It has been held in Mississippi, that a court of chancery will not enjoin a widow from proceeding to enforce a decree for the allotment of dower, obtained in the probate court, where the party asking the injunction is a stranger to the proceeding in that court, and claims by paramount title. If the widow be in possession, the remedy of the claimant in such case is by ejectment. If the claimant be in possession, he may make his defence when she brings her action to dispossess him. *Pickens v. Wilson*, 13 S. & M. 691; *James v. Rowan*, 6 S. & M. 393; post, ch. viii., §§ 41-45.

³ *Baker v. Bond*, 1 Law J. 194, V. C.; *Garton v. Bates*, 4 B. Mon. 366; *Davenport v. Farrar*, 1 Scam. 314; 1 Bright, H. & W. p. 420, pl. 5. The allegation that the husband was invested with the legal title, is of course unnecessary in the States where dower is allowed in equities. See post, §§ 26-31.

⁴ Ante, § 9, note.

⁵ *Wells v. Sprague*, 10 Ind. 305; ante, ch. vi., § 29.

⁶ *Darnall v. Hill*, 12 Gill & J. 388. See ante, ch. vi., §§ 1, 2; post, ch. xxvi., §§ 1-14.

Allegations that complainant was the wife of one who was seized of the land; his death; his alienation of the land during the coverture, and of possession with claim of title by the defendant, are *prima facie* sufficient to entitle the complainant to a decree. An express averment that the defendant obtained and held the land under the husband's title, would be sufficient as to title and jurisdiction. So, also, if such is the conclusion to be fairly drawn from the bill and answer taken together;¹ for, as a widow is not presumed to know the precise nature of her husband's title, defective allegations in regard thereto may be aided by the answer.² But an answer, when responsive to the bill, will prevail, unless overcome by proof.³ In Illinois it is held that the record should show the evidence upon which a decree for dower is founded; and where the answer to the petition admits the right, and no evidence is furnished of the release of it, it will be presumed that a decree which does not order an assignment of dower is erroneous.⁴

18. A bill setting up an equitable title in the widow, with a prayer in the alternative, that if this claim shall fail, dower may be assigned, is not, for that reason, multifarious.⁵

Parties.

19. One advantage resulting to the widow by proceeding in a court of equity, is, that she is thereby enabled to bring before the court all the parties interested in the subject-matter of her claim, and to have their conflicting rights fully settled. This is placed in a very strong light by the chancellor, in his opinion in the case of *Badgley v. Bruce*.⁶ "In the case under consideration," he said, "there was a difficulty in proceeding at law at the time this bill was filed, inasmuch as the premises were in the actual occupancy of a termor whose term had not yet expired; and the complainant could not ascertain how long it was to continue. Previous to the revised statutes, the remedy at law for dower was by

¹ *Wall v. Hill*, 7 Dana, 173.

² *Garton v. Bates*, 4 B. Mon. 366.

³ *Edmondson v. Montague*, 14 Ala. 370. In Ohio, an answer to a petition for dower, simply denying the right as claimed, amounts to the general issue, and is not admissible, either under the code, or in chancery. *Finch v. Finch*, 10 Ohio St. 501.

⁴ *Osborne v. Horine*, 17 Ill. 92.

⁵ *Rockwell v. Morgan*, 2 Beasl. Ch. 384.

⁶ *Badgley v. Bruce*, 4 Paige, 98.

a writ of dower *unde nihil habet*. But as this was a species of real action, it could only be sustained against the owner of the freehold. It would not have lain against the defendant Halsey, who was merely a tenant for years.¹ The widow applied to the tenant in possession, and he refused to assign her dower because he was not the owner of the land; and the tenant of the freehold refused to give her the assignment to which she was entitled, because he had a covenant of warranty from some one else. Under such circumstances, I think she was right in applying to the equity court for relief, so that she might obtain the actual possession of her dower right in the premises, notwithstanding the existence of the term for years. As the law then stood, the complainant could have recovered neither damages or costs in a suit at law by writ of dower. And if she had brought her suit against the owner of the freehold, he would have had it in his power to vouch his grantor to warranty; and thus the litigation would have been protracted, as well as expensive. And her costs would probably have been more than the value of her dower."²

20. But where there are no conflicting claims to, or interests in, the property, the present owner is the only necessary party defendant, even though the lands have come to him through several intermediate conveyances.³ And where the lands have been aliened by the husband in his lifetime, it is not necessary to make his heirs parties to the bill.⁴ In Ohio, it is held, in this respect conforming to the rule of the common law,⁵ that where the husband, during coverture, was seized of several tracts of land, which, after his decease, have come into various hands, a petition for dower should be preferred against each separate holder.⁶ The rule is the same in Alabama.⁷ In Virginia, it has been held, that in cases of this kind, the widow may elect whether to join all the defendants in one suit, or bring separate actions against each.⁸ So in Kentucky,

¹ Ante, ch. vi., §§ 21-25.

² In Ohio, when the rights of any mortgagee, or the lien of any judgment creditor shall be shown to the court by cross-petition filed before the rendition of a decree, such rights and liens shall be regarded by the court, and no inequality allowed, nor injustice done to any of the parties. 1 Rev. Stat. Ohio, by Swan & Critchf. p. 520, § 10.

³ Blair v. Thompson, 11 Gratt. 441; Boyden v. Lancaster, 2 P. & H. (Va.), 198.

⁴ Boyden v. Lancaster, 2 P. & H. (Va.), 198.

⁵ Ante, ch. vi., § 21.

⁶ Allen v. McCoy, 8 Ohio, pt. 2, pp. 418, 463.

⁷ Barney v. Frowner, 9 Ala. 901.

⁸ Boyden v. Lancaster, 2 P. & H. 198.

where the husband of the complainant was seized of the *entire* tract during coverture, she may rightfully join in her suit for dower all those who have acquired title to, and are in the occupancy of the same, though their titles were derived by separate and distinct purchases.¹ In Alabama, intermarriage of the widow during the pendency of the suit does not render it necessary to unite her husband in the proceeding.² And the widow is not required to make the administrator of her deceased husband a party to a bill for dower in an equity of redemption, unless she pray some relief as against him.³

21. Where a vendee of the husband neglects to pay the balance due for the purchase-money, the widow may unite in a bill with the heirs for a rescission of the contract and the assignment of her dower in the premises sold.⁴ And it seems that in Virginia, a joint suit in chancery may be maintained in behalf of a widow and heirs or devisees, to recover lands in which the widow has a right to dower, and that the court will entertain the bill for the whole subject in controversy, and after decreeing the lands to the plaintiffs, will go on and decree an assignment of dower to the widow, partition among the plaintiffs, and rents and profits against the defendants.⁵ But in Iowa, it has been held that the widow is not a proper party complainant with the heirs in a bill to establish an interest in behalf of the husband in lands the title to which is in a third person. She must await the event of a suit brought by the heirs, and if they are successful, she may then institute a separate proceeding for the allotment of her dower.⁶

Mode of procedure where the title is disputed.

22. If the right of the widow is admitted by the answer, the court will proceed at once to assign the dower, and to take an account of the arrears, if the case be a proper one for an account.⁷ But notwithstanding the readiness which courts of equity manifest

¹ *Marshall v. Anderson*, 1 B. Mon. 198. ² *Potier v. Barclay*, 15 Ala. 439.

³ *Campbell v. Murphy*, 2 Jones, Eq. 357.

⁴ *Gray v. Sparrow*, 3 B. Mon. 110. See *Dean v. Mitchell*, 4 J. J. Marsh. 451; *Kintner v. McRae*, 2 Carter (Ind.), 453.

⁵ *Johnson v. Johnson*, 1 Munf. 549, 554, note.

⁶ *Stewart v. Chadwick*, 8 Clarke (Iowa), 463.

⁷ *Mundy v. Mundy*, 2 Ves. Jr., 129; *Badgley v. Bruce*, 4 Paige, 98; *Scott v. Crawford*, 11 Gill & J. 365; 2 Dan. Ch. Pr. 1343.

to give relief to widows claiming dower, it seems universally admitted, that the question of *right*, if controverted, must be tried by a jury; no case having ever gone the length of holding, that when the parties are before the court upon a bill for dower, and the title of the complainant to be endowed is denied by the answer, the court has any incidental jurisdiction to inquire into that question itself.¹

23. Mr. Roper says:² "In consequence of the widow's title being purely legal, when any question of dower has arisen in a court of equity, and doubts have been entertained of the widow's title, it has been the constant practice to put her to bring a writ of dower." But upon this point Mr. Jacob observes:³ "This rule does not appear to be imperative in cases where the title can be tried in a more convenient mode. In a recent instance, the right depending on a question of law, a case was directed." And according to Mr. Daniell, if the title to dower be disputed, it is the practice of the equity courts to refer the decision to a court of law, either by directing an issue or by ordering the bill to be retained for a certain time, with liberty to the complainant to bring a writ of dower, as she may be advised.⁴ The practice in the American courts is for the chancellor to retain the bill for a reasonable time until the right at law is established.⁵ And an order directing this to be done is not the subject of appeal.⁶

24. In the English practice, where the marriage is disputed, as in *Curtis v. Curtis*,⁷ a writ of dower seems, according to Mr. Jacob, to be necessary, as the question must regularly be tried by the bishop's certificate, which it appears can only be obtained through

¹ *Curtis v. Curtis*, 2 Bro. C. C. 631, 633; *Mundy v. Mundy*, 2 Ves. Jr. 128; *D'Arcy v. Blake*, 2 Sch. & Lef. 387; *Swaine v. Perine*, 5 John. Ch. 482; *Hartshorne v. Hartshorne*, 1 Green, Ch. 349; *Rockwell v. Morgan*, 2 Beasl. Ch. 384; *Wells v. Beall*, 2 Gill & J. 468; *Sellman v. Bowen*, 8 Gill & J. 50; *Scott v. Crawford*, 11 Gill & J. 365; *Park, Dow.* 329; 1 *Roper, H. & W.* 450. This principle has no application where dower is claimed in *equitable* estates. Post, §§ 26-31.

² 1 *Roper, H. & W.* 450.

³ *Ibid.* note.

⁴ 2 *Dan. Ch. Pr.* 1343.

⁵ *Badgley v. Bruce*, 4 Paige, 98; *Swaine v. Perine*, 5 John. Ch. 482; *Hartshorne v. Hartshorne*, 1 Green, Ch. 349; *Rockwell v. Morgan*, 2 Beasl. Ch. 384; *Wells v. Beall*, 2 Gill & J. 468; *Sellman v. Bowen*, 8 Gill & J. 50; *Scott v. Crawford*, 11 Gill & J. 365. In *London v. London*, 1 Humph. 1, the matter in controversy was submitted to a jury by the chancellor. The Illinois statute provides, that where the claim of the widow is contested, the court shall try the case, or direct an issue for that purpose, as circumstances may require. 1 *Stat. Ill.*, 1858, p. 155, § 21.

⁶ *Scott v. Crawford*, 11 Gill & J. 365.

⁷ *Curtis v. Curtis*, 2 Bro. C. C. 620.

the medium of a writ issued for that purpose from a court in which an action of dower is pending.¹ However, in *Poole v. Poole*,² witnesses were examined upon the issue upon the plea *ne unques accouplè*.³

25. But although a court of equity will not pass upon a disputed title, it will give every assistance to the widow in its power, by paving the way for her to establish her right at law, and by giving complete relief when the right is ascertained.⁴ And therefore, if she can not ascertain the lands out of which she is dowable, the court will assist her to find them out, and will order her to proceed upon a particular part, and reserve the further consideration until after judgment.⁵ So, also, it will aid her with a discovery of the title-deeds.⁶ And a bill lies for the discovery of a tenant to the *precipe* whereby to ground an action of dower.⁷ And where the answer of the defendant admitted the seizin of the husband, his death, the possession of his family since his death, and alleged an offer by the defendant to give the complainant one-third of the income derived from the whole estate, or to pay her the valuation thereof, and did not deny the marriage, it was held that a court of equity had jurisdiction to proceed with the case without a trial at law.⁸ And in New Jersey, it has been held that a court of equity may inquire of what estate the husband died seized, and into the nature and character of his right thereto.⁹

Cases in which courts of equity have exclusive jurisdiction.

26. We have seen that in England, prior to the 3 & 4 Will. IV., chapter 105,¹⁰ dower was not allowed in equitable estates.¹¹ The husband was required to be invested with a legal seizin in order to confer that right. The rule, in this respect, was the same in equity

¹ See ante, ch. v., § 20.

² *Poole v. Poole*, Younge, Eq. Ex. 331.

³ 1 Bright, H. & W. 421, pl. 7.

⁴ *Curtis v. Curtis*, 2 Bro. C. C. 634; *Mundy v. Mundy*, 2 Ves. Jr. 129.

⁵ Per Lord Hardwicke, in *Dormer v. Fortescue*, 3 Atk. 130, and Lord Redesdale, in *D'Arcy v. Blake*, 2 Sch. & Lef. 391.

⁶ See 2 Bro. C. C. 631, in *Curtis v. Curtis*; and 2 Sch. & Lef. 387, in *D'Arcy v. Blake*. But it is questionable whether this assistance will be given as against a purchaser for a valuable consideration without notice. Post, §§ 32-38.

⁷ *Kempe v. Risbie*, Toth. 84; *Park, Dow.* 329; 1 Roper, H. & W. 450.

⁸ *Scott v. Crawford*, 11 Gill & J. 365.

⁹ *Rockwell v. Morgan*, 2 Beasl. Ch. 384.

¹⁰ Vol. i., Appendix.

¹¹ Vol. i., ch. xx.

as at law; and in the exercise of their concurrent jurisdiction, courts of equity could not, any more than courts of law, allow a claim of dower, except where a *legal* right thereto was established.

27. But in this country a different principle was introduced at a very early day. In Virginia, the right of dower was extended to equitable estates in 1785, and a large proportion of the States have since adopted the same liberal rule.¹ And as equitable estates are not recognized in the courts of law, it results that courts of equity have *exclusive* jurisdiction of claims for dower in this species of estate.²

28. It has been shown, also, that in England, *equities of redemption* of mortgages in fee have been regarded as equitable estates, and as such, prior to the late Dower Act, not subject to dower.³ With us, the general doctrine is, that the holder of the equity of redemption is, as against all persons but the mortgagee and those claiming under him, invested with the legal ownership of the mortgaged premises so long as there is no foreclosure; and that dower attaches thereon in the same manner as upon any other legal estate.⁴ Upon this principle, where the mortgage has not been redeemed, the widow of the mortgagor may maintain an action for dower in the courts of law, or in the courts of equity, at her option, as against all persons except the mortgagee and those succeeding to his rights. As against them, her *only* remedy is by bill in equity to redeem.⁵ If the mortgage has been redeemed under such circumstances as to render her liable to contribution, equity is the proper forum in which to have her rights adjusted.⁶ But she can not file a bill to redeem a mortgage, and call on the mortgagee to account for the rents and profits, where the mortgage is not an incumbrance upon her dower right, as where it was executed during coverture and she did not join her husband in its execution.⁷

29. In equity, partnership lands are regarded as personalty, and not subject to dower until the firm creditors and the debts due the several partners, as among themselves, are fully paid.⁸ As a con-

¹ Vol. i., ch. xx.

² *McMahan v. Kimball*, 3 Blackf. 1.

³ Vol. i., ch. xxii. As to relief in the English courts of equity against satisfied mortgages and attendant terms, see vol. i., ch. xxxiii., § 3, note.

⁴ Vol. i., ch. xxii., §§ 8-20.

⁵ Vol. i., ch. xxiii., § 22; *Farwell v. Cotting*, 8 Allen, 211; *Strong v. Converse*, Ibid. 557; *Chiswell v. Morris*, 1 McCarter's Ch. (N. J.) 101; *Eldridge v. Eldridge*, Ibid. 195.

⁶ Vol. i., ch. xxiv.

⁷ *Opdyke v. Bartles*, 3 Stockt. Ch. 133.

⁸ Vol. i., ch. xxvi.

sequence of this rule, a claim for dower on the part of the widow of one of the partners is postponed until the partnership affairs are adjusted.¹ But if the settlement be unreasonably delayed, the widow, by bill in equity, may compel a speedy adjustment of the business of the firm, and an assignment of her dower in her husband's proportion of the surplus.²

30. Where a vendee of lands has died without making full payment of the purchase-money, and without having received a conveyance of the legal title, his widow may, nevertheless, in those States in which dower is allowed in equitable estates, go into a court of chancery and compel a sale of the lands for the satisfaction of the balance due the vendor, and an assignment of her dower in the surplus.³

31. So the wife may be relieved in equity against a fraudulent conveyance executed by her husband with intent to defeat her dower.⁴ And to the extent of establishing the invalidity of the conveyance as against the wife, this relief may be had during the lifetime of her husband.⁵ So in a case where the husband purchased lands of his son at an exorbitant price, and executed his bond and mortgage for the purchase money, with intent to prejudice his wife's interests in his estate, a court of equity, after the death of the husband, required the son to satisfy the bond and mortgage from the personalty which had come to his hands.⁶ And where a widow, intending to dissent from her husband's will, has been prevented from doing so by the fraud and misrepresentation of the executor, a court of equity will relieve her, and give her such portion of the estate as she would have been entitled to had she dissented within the time required by law.⁷ In a case in New Jersey, an injunction was allowed on the application of the widow, before the assignment of dower, to stay waste upon the premises subject to her right. The land in question was principally woodland, and the alleged waste

¹ Vol. i., ch. xxvi., § 21.

² *Goodburn v. Stevens*, 1 Md. Ch. Dec. 420; s. c. 5 Gill, 1.

³ *Thompson v. Cochran*, 7 Humph. 72; *Daniell v. Leitch*, 13 Gratt. 195. See vol. i., ch. xx., § 44.

⁴ *Swaine v. Perine*, 5 John. Ch. 482; *London v. London*, 1 Humph. 1; *Davis v. Davis*, 5 Misso. 183; *Tate v. Tate*, 1 Dev. & Bat. Eq. 22; *Petty v. Petty*, 4 B. Mon. 215, 217. See vol. i., ch. xxviii., §§ 10-14.

⁵ *Petty v. Petty*, 4 B. Mon. 215, 217. See vol. i., ch. xxviii., § 12.

⁶ *Holmes v. Holmes*, 3 Paige, 363.

⁷ *Smart v. Waterhouse*, 10 Yerg. 94. See post, ch. xvii.

consisted in cutting down and carrying off the wood. It was objected, that as the heir was unquestionably the owner of the land and entitled to its use, and as the widow could not herself take off the wood, and no injury, therefore, was done to her, she was not entitled to an injunction. But the court unanimously granted the rule.¹

Equitable defences.

32. It is a general rule, that although courts of equity have concurrent jurisdiction with courts of law in the assignment of dower, yet in the exercise of that jurisdiction, where the widow is seeking no *equitable* relief, they will treat her claim as a strictly legal right, and be governed by the same rules by which courts of law are controlled, and will not allow an equity to be interposed to defeat the dower.² But the defendant may avail himself of all *legal* defences, and therefore in those States where the Statute of Limitations is a bar to dower,³ he may plead the statute in equity, as well as at law.⁴

33. In England, however, after many conflicting decisions upon the point, it seems now to be settled, that a plea of a purchase for valuable consideration without notice, is a defence when the widow is suing in equity.⁵

34. This point arose in *Williams v. Lambe*,⁶ and it was decided in that case, that a widow who filed her bill for dower against the purchaser of the lands from her husband during the marriage, praying a discovery of them, and an assignment of dower, could not be defeated of either by a plea that the tenant was a purchaser for a valuable consideration without notice. This decision is approved by Mr. Roper. "This last decision, though quarrelled with," he observes, "is, as it would seem, sound and proper; for when it is admitted that dower is a mere legal right, and that courts of equity in assuming a concurrent jurisdiction with courts of law, professedly

¹ *Harker v. Christy*, 2 South. 717.

² 1 Roper, H. & W. 450, 451; 1 Story's Eq. § 630; *Mayburry v. Brien*, 15 Pet. 21; *Blain v. Harrison*, 11 Ill. 384; *Tod v. Baylor*, 4 Leigh, 498; *O'Brien v. Elliot*, 15 Maine, 125; *Potier v. Barclay*, 15 Ala. 439; *Campbell v. Murphy*, 2 Jones, Eq. 357; *Ridgway v. Newbold*, 1 Harring. 385; *Gano v. Gilruth*, 4 G. Greene, 453. As to the circumstances under which a widow will be held barred in equity by a collateral satisfaction, or an equitable jointure, see post, chapters xi. and xv.

³ See post, ch. xx.

⁴ *Phares v. Walters*, 6 Clarke (Iowa), 106.

⁵ 1 Bright, H. & W. p. 421, pl. 11.

⁶ *Williams v. Lambe*, 3 Bro. C. C. 264.

act upon the legal right, those courts, in analogy to law, where such a plea would not be looked at, decide that in this instance the same equitable plea is also inadmissible. This analogy, it is obvious, does not hold when the widow applies for *equitable* relief, as the removal of terms, &c. In such cases, the equitable plea of being a purchaser for value without notice, can not, as it would seem, be resisted. In the first case, the widow, proceeding upon the concurrent jurisdiction of the court, merely enforces a right which the defendant can not at law resist by such a mode of defence; in the second case, she applies to the equity of the court to take away from him a defence which at law would protect him against her demand."¹

35. Upon the same subject, however, Mr. Jacob has the following observations:² "A similar rule was acted on in *Rogers v. Seale*.³ But the principle that equity will not interfere against a purchaser for valuable consideration without notice, is commonly laid down in general terms without reference to the nature of the plaintiff's title; and in *Wallwyn v. Lee*,⁴ the Lord Chancellor held a plea of purchase good to a bill for discovery and relief founded on a legal title.⁵ And it seems to be clear, that a plea of purchase is a good defence to a bill of discovery, though the plaintiff's title be legal.⁶

¹ 1 Roper, H. & W. 451, 452. See, also, Beam. Pl. Eq. 234, 245; 3 Bro. Ch. 264, Belt's note (1); Mitf. Pl. Eq. 274, by Jeremy, and note (d); 2 Fonbl. Eq. b. 2, ch. 6, § 2, note (h); 1 Ibid. b. 1, ch. 4, § 25, and note. Mr. Justice Story, while appearing to concur in these views, nevertheless adds: "Other learned minds have, however, arrived at a different conclusion; and have insisted that, upon principle, the plea of a purchase for a valuable consideration without notice, is a good plea in all cases, against a legal, as well as against an equitable claim; and that dower constitutes no just exception from the doctrine. They put themselves upon the general principle of conscience and equity, upon which such a plea must always stand; that such a purchaser has an equal right to protection and support as any other claimant; and that he has a right to say, that, having *bonâ fide* and honestly paid his money, no person has a right to discover any facts which shall show any infirmity in his title. The general correctness of the argument can not be doubted; and the only recognized exception seems to be that of dower, if that can be deemed a fixed exception." 1 Story's Eq. §§ 630, 631.

² 1 Roper, H. & W. 451, note.

³ *Rogers v. Seale*, 2 Freem. 84; 2 Eq. Ca. Ab. 70. And see *Medlicott v. O'Donel*, 1 Ball & B. 171.

⁴ *Wallwyn v. Lee*, 9 Ves. Jr. 24, 33.

⁵ See to the same effect, *Jerrard v. Saunders*, 2 Ves. Jr. 454; *Parker v. Blythmore*, Prec. Ch. 58; 2 Eq. Ca. Ab. 79; *Robinson v. Haynes*, Gilb. Eq. R. 184.

⁶ *Burlace v. Cooke*, 2 Freem. 24; 2 Eq. Ca. Ab. 681; *Abery v. Jones*, 1 Vern. 27;

So, according to some authorities,¹ a bill to perpetuate testimony, which is generally founded on a legal title, will not lie against a purchaser for valuable consideration without notice; and the Lord Chancellor in intimating a contrary opinion, stated as the ground of it, that such a bill calls for no discovery from the defendant, but merely prays to secure the testimony.² The plea in *Williams v. Lambe*, was perhaps open to another objection. The defendant stated himself to have purchased, without being aware that the vendor was married. But it seems doubtful whether a person purchasing of one seized in fee, without inquiring whether the vendor be married, can avail himself of want of notice of that fact."³

36. The authority of *Williams v. Lambe*, was followed in the case of *Collins v. Archer*.⁴ But in *Payne v. Compton*,⁵ it was held that the plea was available as a defence against a legal title.⁶ And Sir Edward Sugden, in his treatise on Vendors and Purchasers,⁷ after citing the authorities, concludes with remarking that the point can hardly be considered as concluded by the weight of authority; and that upon principle it would rather seem that Lord Rosslyn's decision in *Jerrard v. Saunders*,⁸ that the plea should stand good against a legal as well as an equitable title, was the correct one. And the point has since been so decided by Sir E. Sugden, in the case of *Joyce v. De Moleyns*.⁹

Bishop of Worcester v. Parker, 2 Vern. 255; *Hoare v. Parker*, 1 Cox, 224; 1 Bro. C. C. 578.

¹ 1 Vern. 354; 2 Vern. 159; 2 Ves. Jr. 458.

² See 6 Ves. Jr. 263.

³ See 3 Sugd. V. & P. 492, 10th ed.; *Kelsal v. Bennet*, 1 Atk. 522; *Park, Dow*, 327, 328.

⁴ *Collins v. Archer*, 1 Russ. & M. 284.

⁵ *Payne v. Compton*, 2 Younge & Coll. Exch. Ca. 457, 461.

⁶ Neither of these cases, however, was founded on a claim of dower.

⁷ 3 Sugd. V. & P. 10th ed., p. 496.

⁸ *Jerrard v. Saunders*, 2 Ves. Jr. 454.

⁹ *Joyce v. De Moleyns*, 2 Jones & Lat. 374; 1 Bright, H. & W. 423. See, also, *Bowman v. Evans*, 1 Jones & Lat. 178; 2 Spence, Eq. 733, and note (c). The case of *Joyce v. De Moleyns*, is observed upon by Lord Cottenham, C., in *Frazer v. Jones*, 17 Law J. Chan. 353, thus: "But then comes the question which I should not have had much difficulty about if it had not been for the case of *Joyce v. De Moleyns*, which raises a proposition that I believe is raised for the first time; because the case of *Wallwyn v. Lee*, 9 Ves. 24, which is supposed to have been an authority for it, is very distinguishable; but it raises, undoubtedly, a question, and one that is perhaps extremely difficult to deal with against the authority on which that case was pronounced; at least, it is one that requires careful consideration before I should feel justified in overruling a decision so much considered as the case of *Joyce v. De Moleyns* appears to have been."

37. In a more recent English case, after full argument and careful consideration of the question, the doctrine laid down by Sir Edward Sugden, was re-affirmed. The case was an action to recover dower, and the demandant sought, under the 14 and 15 Vict. c. 99, § 6, to have an inspection of the deed by which her husband conveyed away the property out of which she claimed dower. The application was resisted upon the ground that the defendant was a *bonâ fide* purchaser for value, without notice. "On referring to the authorities," said the court, "it appears that this is a point which has been much controverted. In the case of *Williams v. Lambe*,¹ on a bill filed by a dowress, Lord Thurlow overruled a plea of a *bonâ fide* purchase without notice of the marriage; and his lordship said that he thought, where the party is pursuing a legal title, as dower is, that plea does not apply, it being only a bar to an *equitable*, not to a *legal* claim. And the same point was decided by Leach, M. R., in *Collins v. Archer*;² and his Honor said, that, following the case of *Williams v. Lambe*, and the general principle of a court of equity, he was of opinion that the defence was of no avail against the legal title. On the other hand, in *Jerrard v. Saunders*,³ Lord Loughborough, held, that the plea *could* stand against a *legal* as well as an *equitable* title. In *Roper on Husband and Wife*, second edition, page 451, the author approves of the doctrine of *Williams v. Lambe*. But a contrary view is taken in a note to this passage by the learned editor, Mr. Jacob. And Lord St. Leonards, in his treatise on Vendors and Purchasers, c. 18, also expressed his opinion in favor of Lord Loughborough's and against Lord Thurlow's ruling; and afterwards, as Chancellor of Ireland, decided the case of *Joyce v. De Moleyns*,⁴ accordingly. A subsequent case of *The Attorney-General v. Wilkins*,⁵ has occurred before Romilly, M. R., and his decision was in accordance with that of Lord St. Leonards. And his Honor stated the principle to be, that, when you once establish that a person is a purchaser for value, without notice, a court of equity will give no assistance against him; but the right must be enforced at law. It appears, then, that the weight of authority is greatly in favor of the proposition that no bill for a discovery could have been maintained in this case before the Com-

¹ *Williams v. Lambe*, *supra*.

² *Collins v. Archer*, *supra*.

³ *Jerrard v. Saunders*, *supra*.

⁴ *Joyce v. De Moleyns*, *supra*.

⁵ *Att.-Gen. v. Wilkins*, 17 Beav. 285.

mon Law Procedure Act, 1854. Consequently we think that this rule must be discharged.”¹

38. But in the American courts the doctrine is well settled that the plea of a *bonâ fide* purchase for value, is no defence, even in a court of equity, against a legal claim to dower. “It is evident,” said the chancellor, in the early case of *Snelgrove v. Snelgrove*,² “that this doctrine remains unsettled, for it does not appear that the cases have ever been collated, sifted, and a final conclusion drawn from such comparison. It is obvious from an inspection of the cases generally, that in most of them where the plea has been supported, it has been against an equitable and not a legal title. Mr. Sugden, in his judicious collection of the doctrine and the authorities upon this subject, says, ‘that to argue from principle, it seems clear that the plea is a protection against a legal as well as an equitable claim; and as the authorities in favor of that doctrine certainly preponderate, we may perhaps venture to assert that it will protect against both.’ I am not entirely satisfied that this is a correct conclusion. The inclination of my mind is the other way. It should be remembered that the plea protects, by the court refusing to aid the complainant in setting up a title. Now, when the title attempted to be set up is an equitable one, it seems very reasonable that the court should forbear to give its assistance in setting up such equitable title against another title set up by a fair purchaser. But when the complainant comes with a legal title, I do not perceive how he can be refused the aid of the court. It seems no longer to be optional.” In numerous cases of a more recent date, this principle is enforced in clear and emphatic terms.³

39. There are several cases, however, in the American reports, in which courts of equity have allowed equitable defences to overcome a legal demand for dower. Thus, in *Rolls v. Hughes*,⁴ it was held, that even though a right of dower be not embraced by the Statute of Limitations,⁵ and therefore not barred at law, yet in

¹ *Gomm v. Parrott*, 3 Com. Bench R., N. S. 47. See, also, 2 Lead. Eq. Cas. pt. 1, p. 43.

² *Snelgrove v. Snelgrove*, 4 Desaus. 274, (1812).

³ *Blain v. Harrison*, 11 Ill. 384; *Rankin v. Oliphant*, 9 Misso. 239; *Larowe v. Beam*, 10 Ohio, 498; *Brown v. Wood*, 6 Rich. Eq. 155; *Blake v. Heyward*, 1 Bailey, Eq. 208; *Campbell v. Murphy*, 2 Jones, Eq. 357; *Ridgway v. Newbold*, 1 Harring. 385; *Jenkins v. Bodley*, 1 Smedes & M. Ch. 338; *Willes v. Cooper*, 24 Missis. 208; *Gano v. Gilruth*, 4 G. Greene (Iowa), 453; *Daniell v. Hollingshead*, 16 Geo. 190. See note to the case of *Gomm v. Parrott*, 3 Com. Bench Rep. N. S. 58, Am. ed.

⁴ *Rolls v. Hughes*, 1 Dana, 407.

⁵ See post, ch. xx.

chancery, if "a party has slept upon his rights for twelve years, good policy requires he should be left to his common law remedy," and upon this ground the bill in that case was dismissed. So it has been held that lapse of time may operate as a bar to a proceeding for an account of arrears of dower,¹ the chancellor observing, that "in equity, laches and neglect are discountenanced; this tribunal only lends its power to reasonable diligence." So where a widow, after having recovered her dower in a court of law, instituted proceedings in equity for arrears, the court permitted an equitable defence to stand.² "We are of opinion," they said, "that, in appealing to the court of law, the complainant selected her own tribunal, and must be content with the relief administered by the rules of law. By the well established principles and usages of this court, she might have instituted proceedings in the court of equity, both for dower and arrears of dower. It is true that her claim might here have encountered a defence to which it was not obnoxious in the ordinary tribunal. She has selected the mode, and must abide by the measure of redress."³

40. From what has been already said it sufficiently appears, that when the widow applies for *equitable* relief, and her claim to dower is not founded upon a *legal* right, cognizable in a court of law, the defendant may avail himself of any equitable defence existing in his favor.⁴

Assignment of dower by courts of equity.

41. The right of dower being established, and the estate out of which the wife is dowable ascertained, the next step is to assign the dower. This may be done, either by reference to a master,⁵ or by directing a commission to issue.⁶ It generally forms part of

¹ *Steiger v. Hillen*, 5 Gill & J. 121. See, also, *Kiddall v. Trimble*, 1 Md. Ch. Dec. 143, 150.

² *Bullock v. Griffin*, 1 Strobh. Eq. 60.

³ See, also, *Flagg v. Maun*, 2 Sumn. 486.

⁴ 1 Roper, H. & W. 451; 1 Story's Eq. § 630; *Snelgrove v. Snelgrove*, 4 Desaus. 274; *Larrowe v. Beam*, 10 Ohio, 498.

⁵ 2 Dan. Ch. Pr. 1343; *Goodenough v. Goodenough*, 2 Dick. 795; *Swaine v. Perine*, 5 John. Ch. 482; *Seaton on Decrees*, 261; 2 Crabb, Real Prop. 188.

⁶ 2 Dan. Ch. Pr. 1343; *Seaton on Decrees*, 262; 2 Crabb, R. P. 188; *Wild v. Wells*, 1 Dick. 3; *Megott v. Megott*, 2 Dick. 794; *Lucas v. Calcraft*, 1 Bro. C. C. 134; s. c. 2 Dick. 594; *Mundy v. Mundy*, 2 Ves. Jr. 129; *Worgan v. Ryder*, 1 V.

the decree that when dower has been assigned, possession shall be delivered to the plaintiff.¹

42. In assigning dower by metes and bounds,² or in the rents and profits where the property is incapable of division,³ courts of equity adhere to the rules observed in such cases in the courts of law; both courts being governed, in this respect, by the same general principles.⁴

43. Cases, however, frequently occur, in which courts of equity are called upon to endow the wife of moneys within their control arising from the sale of the husband's lands under such circumstances as not to entirely extinguish the right of dower. Thus, where the vendor of lands compels a sale after the death of the vendee, to satisfy a balance due for the purchase money;⁵ or where the sale is made by the administrator of the vendee for the same purpose;⁶ or where lands are sold under proceedings in foreclosure;⁷ in these, and in like cases, the court will give to the wife dower in the surplus moneys produced by the sale.⁸ And in some States the dower interest of the wife is protected even where the sale takes place in the lifetime of the husband.⁹ So where the wife joins in a conveyance to a trustee to enable him to make sales, she is dow-

& B. 20; *Huddleston v. Huddleston*, 1 Ch. Rep. 38; *Curtis v. Curtis*, 2 Bro. C. C. 620; *Swaine v. Perine*, 5 John. Ch. 482. In many of the American States provision is made by statute for the appointment of commissioners by the court to assign the dower.

¹ 2 Dan. Ch. Pr. 1344; *Meggot v. Meggot*, Seaton on Decrees, 261; *Goodenough v. Goodenough*, 2 Dick. 795; *Swaine v. Perine*, 5 John. Ch. 482, 496.

² See post, ch. xxi.

³ See post, ch. xxiii.

⁴ *Tod v. Baylor*, 4 Leigh, 498; *Gibson v. Marshall*, 5 Rich. Eq. 254. And see authorities cited ante, note to § 32.

⁵ *Kluttz v. Kluttz*, 5 Jones, Eq. 80; *Williams v. Woods*, 1 Humph. 408; *Thompson v. Cochran*, 7 Humph. 72; *Warner v. Van Alstyne*, 3 Paige, 513; *Willett v. Beatty*, 12 B. Mon. 172. See vol. i., ch. xxv., § 4.

⁶ *Ibid.* See, also, *Brewer v. Van Arsedale*, 6 Dana, 204; *Mills v. Van Voorhis*, 23 Barb. 125, 136.

⁷ *Titus v. Neilson*, 5 John. Ch. 452; *Tabele v. Tabele*, 1 John. Ch. 45; *Hawley v. Bradford*, 9 Paige, 200; *Jennison v. Hapgood*, 14 Pick. 345; *Hartshorne v. Hartshorne*, 1 Green, Ch. 349. See vol. i., ch. xxiii., §§ 24, 25.

⁸ *Ibid.*; *Church v. Church*, 3 Sandf. Ch. 434; *Willett v. Beatty*, 12 B. Mon. 172; *Mills v. Van Voorhis*, 23 Barb. 125; *Lawrence v. Miller*, 2 Comst. 245; *Higbie v. Westlake*, 4 Kern. 281; *Hawley v. James*, 5 Paige, 318.

⁹ *Denton v. Nanny*, 8 Barb. 618; *Vartie v. Underwood*, 18 Barb. 562. See *Heth v. Cocke*, 1 Rand. 344; vol. i., ch. xxiii., §§ 26-30; ch. xvi., §§ 18-32; ch. xxv., § 7.

able, in equity, after the death of her husband, of the moneys in the hands of the trustee arising from sales made by him.¹

44. The practice of the courts as to the manner of endowing the widow of moneys arising from the sale of lands, is not uniform in the several States. In Maryland,² Kentucky,³ Maine,⁴ and Massachusetts,⁵ it seems a gross sum may be awarded to her in compensation for her dower, estimated upon the principles of ascertaining the present value of life annuities applicable to such cases.⁶ But in the Federal courts,⁷ and in Virginia,⁸ Alabama,⁹ and Tennessee,¹⁰ this can not be done without the consent of all the parties interested. Ordinarily in these States, the decree is for the payment annually, of the sum ascertained to be the annual value of the dower interest, or of the interest upon one-third of the moneys subject to dower. In South Carolina, a rule is adopted by which it is assumed that the dower estate is equal in value to one-sixth of the entire fee, and a gross sum is assessed to the widow upon that principle.¹¹ In New York, the practice appears to be, to direct the fund to be invested, and the interest, or income, to be paid to the widow during her life.¹²

45. In assigning dower in equities of redemption, in cases where the widow is required by law to contribute to the redemption of the mortgage,¹³ she must pay such sum as is equivalent to the interest on one-third of the mortgage debt during her life.¹⁴ And this must be paid in a gross sum unless the mortgagee elect to permit the

¹ *Hawley v. James*, 5 Paige, 318.

² *Goodburn v. Stevens*, 1 Md. Ch. Dec. 441; *Maccubbin v. Cromwell*, 2 H. & G. 443; *Wilhelm v. Wilhelm*, 4 Md. Ch. Dec. 330. See *Chase's case*, 1 Bland; Ch. *206.

³ *Brewer v. Van Arsdale*, 6 Dana, 204.

⁴ *Simonton v. Gray*, 34 Maine, 50; *Carll v. Butman*, 7 Greenl. 102.

⁵ *Jennison v. Hapgood*, 14 Pick. 345.

⁶ See post, ch. xxiv.

⁷ *Herbert v. Wren*, 7 Cranch, 370.

⁸ *Blair v. Thompson*, 11 Gratt. 441; *Wilson v. Davisson*, 2 Rob. 384.

⁹ *Beavers v. Smith*, 11 Ala. 20; *Johnson v. Elliott*, 12 Ala. 112; *Fry v. Merch. Ins. Co.* 15 Ala. 810; *Francis v. Garrard*, 18 Ala. 794.

¹⁰ *Lewis v. James*, 8 Humph. 537.

¹¹ *Wright v. Jennings*, 1 Bail. 277; *Garland v. Crow*, 2 Bail. 24; post, ch. xxiv., §§ 50-56.

¹² *Titus v. Neilson*, 5 John. Ch. 452; *Denton v. Nanny*, 8 Barb. 618. See *Bartlett v. Van Zandt*, 4 Sandf. Ch. 396; vol. i., ch. xvi., §§ 31, 32; post, ch. xxiii., § 9.

¹³ Vol. i., ch. xxiv.

¹⁴ *Swaine v. Perine*, 5 John. Ch. 482; vol. i., ch. xxiv., § 26.

mortgage to stand, in which event she must keep down one-third of the interest.¹ And where there has been a sale of the lands under such circumstances as not to exonerate her from liability to make contribution, and she claims dower in the proceeds of the sale, she is to be charged with such proportion of the mortgage debt as her interest bears to the whole fund.² The mode of arriving at a proper result in these cases, will be more fully explained in a subsequent chapter.³

46. It has been held, that a decree in favor of a demandant for dower, and appointing commissioners to make the assignment, ascertain the intermediate rents and profits, and report to the next term of the court, to which the cause is continued, is not a final decree, but is still within the control of the court, and may be set aside at a subsequent term.⁴ And the return of commissioners in dower, like the report of the master, is under the control of the court. It is intended to satisfy the conscience of the chancellor; and though neither corruption nor misfeasance on the part of the commissioners be charged, the court may, on *ex parte* affidavits, showing error or mistake, refuse to confirm the return, and refer it to the master to take evidence and report upon the facts.⁵

Costs.

47. With respect to costs, they are, in the absence of statutory regulations, in the discretion of the court, and that discretion is regulated by the conduct of the parties. Thus, when the widow's suit is for the single purpose of obtaining an assignment of dower, and there is no misconduct on the part of the defendant, she will not be entitled to costs.⁶ In *Curtis v. Curtis*,⁷ the master of the rolls observed, that the dowress has no costs where the heir has thrown no difficulties or impediments in the way; and if he admit

¹ *Ibid.*; *Bell v. Mayor* N. Y. 10 Paige, 49; *House v. House*, *Ibid.* 158, 164; vol. i., ch. xxiv., § 27. See post, ch. xxiv., §§ 63, 64.

² *Evertson v. Tappen*, 5 John. Ch. 497; *Carll v. Butman*, 7 Greenl. 102; vol. i., ch. xxiv., §§ 31-35. See *Mathews v. Duryee*, 45 Barb. 69.

³ Post, ch. xxiv. See, also, ch. xxiii.

⁴ *Crittenden, Ex parte*, 5 Eng. 333, Walker, J., dissenting.

⁵ *Gibson v. Marshall*, 5 Rich. Eq. 254.

⁶ *Lucas v. Calcraft*, 1 Bro. C. C. 134; 2 Dick. 594; Mitf. Pl. 98, 3d ed.; 2 Bro. C. C. 632.

⁷ *Curtis v. Curtis*, 2 Bro. C. C. 620.

the widow's case he is safe.¹ But if the widow demand an assignment of her dower before bringing suit and her application is refused;² or if she is vexatiously, and without just pretence, kept out of her dower;³ or if the defendant set up an unfounded defence, so as to create a vexatious resistance,⁴ the rule is to give the dowress costs.⁵

¹ To the same effect are *Hazen v. Thurber*, 4 John. Ch. 604; *Swaine v. Perine*, 5 John. Ch. 482; *Hale v. James*, 6 John. Ch. 258; *Russell v. Austin*, 1 Paige, 192.

² *Russell v. Austin*, 1 Paige, 192.

³ *Worgan v. Ryder*, 1 Ves. & Bea. 20.

⁴ *Lucas v. Calcraft*, 1 Bro. C. C. 134.

⁵ 1 Roper, H. & W. 456; *Park, Dow*. 332; *Hale v. James*, 6 John. Ch. 258.

CHAPTER VIII.

SUMMARY PROCEEDINGS FOR THE RECOVERY OF DOWER.

§ 1. Introductory.	34. Mode of procedure in Illinois.
2-11. Mode of procedure in New York.	35. Michigan.
12-17. Massachusetts.	36. Wisconsin, Minnesota, and Oregon.
18. Maine.	37-40. Kentucky.
19. Pennsylvania.	41-45. Mississippi.
20-22. Vermont.	46-53. Alabama.
23. Connecticut.	54-59. North Carolina.
24. Rhode Island.	60. Arkansas.
25. Delaware.	61. Missouri.
26. New Jersey.	62. Kansas.
27, 28. New Hampshire.	63-66. Tennessee.
29. Maryland.	67-71. Georgia.
30. Virginia.	72. Florida.
31-33. Ohio.	73-75. Iowa.

Introductory.

1. IN addition to the legal remedies at law and in equity to which the widow may resort, the statutes of most of the States have provided a summary mode for obtaining an assignment of dower, by application to courts having jurisdiction of probate matters; and this convenient method of proceeding has, in a great degree, superseded the common law remedy by action.¹

Mode of procedure in the several States.

2. *New York.* In this State, if dower be not assigned to the widow within forty days after the death of her husband, she may apply, by petition, for the admeasurement of her dower, to the supreme court; or to the county court of the county where the lands are situated; or to the surrogate of the same county; or,

¹ 4 Kent, 72; 1 Washb. R. P. 2d ed., p. 226, § 11; 1 Hilliard, R. P. 2d ed., p. 172, § 52.

in the city of New York, to the court of common pleas of that city, when the lands are situated therein.¹ The petition should specify the lands of which the widow claims dower;² but it seems it is not necessary that it should state that her husband had been dead forty days when it was presented.³

3. The statute also provides, that after the expiration of forty days from the death of the husband, his heirs, or any of them, or the owners of any land subject to dower, claiming a freehold estate therein, or the guardian of any such heirs or owners, may, by notice in writing, require the widow to make demand of her dower within ninety days after the service of such notice, of the lands of her deceased husband, or of such part thereof as shall be specified in such notice.⁴ If the widow fail to make her demand of dower within the time specified, by commencing a suit, or by application for admeasurement as prescribed by the statute; or if she do not make such demand within one year after her husband's death, although no notice to that effect shall have been given, the heirs of the husband, or any of them, or the owners of any lands subject to dower, claiming a freehold interest therein, or the guardian of such heirs or owners, may apply, by petition, in either of the courts above mentioned, for the admeasurement of the dower of such widow.⁵

¹ 2 Rev. Stat. 488, § 1; Laws 1847, p. 328, § 29; Laws 1854, p. 464, § 6; Code of Procedure, § 30, sub. 5. The widow may apply for admeasurement although proceedings for partition are pending to which she is a party. *Matter of Siperly*, 44 Barb. 370.

² 2 Rev. Stat. p. 488, § 1.

³ *Jackson v. Waltermire*, 7 Cowen, 353; *Crary, Special Proceedings*, 2.

⁴ 2 Rev. Stat. 489, § 6.

⁵ 2 Rev. Stat. 489, § 7; Laws of 1847, p. 328, § 29; Laws of 1854, p. 464; Code of Procedure, § 30; *Crary, Special Proceedings*, 4, 5. Only the persons here named are entitled to apply for the admeasurement of dower. And, therefore, where a purchaser of a widow's right of dower had the dower admeasured and assigned to him, it was held that the proceeding was void, and conferred no title under the statute, even though the heir, or his guardian consented to it. *Jackson v. Aspell*, 20 John. 411. An order of the surrogate, directing the sale of the whole of the real estate of which the husband died seized, for the payment of debts, including the part previously assigned to the widow under proceedings in chancery, is void, so far as relates to her dower estate. Service upon the widow, of the order to show cause, as she had no right to appear and oppose the order for a sale, could not make her a party to the proceedings so that her right would be affected by the decree. *Lawrence v. Miller*, 2 Comst. 245, reversing the judgment of the Superior Court in s. c., 1 Sandf. S. C. 516; *Lawrence v. Brown*, 1 Seld. 394; *Maples v. Howe*, 3 Barb. Ch. 611. Where the husband was seized in severalty, the widow

4. Where the widow proceeds for the admeasurement of dower, a copy of the petition, with notice of the time and place when it will be presented, must be served at least twenty days previous to its presentation, upon the heirs of her husband; or if they are not the owners of the land subject to dower, then upon the owners of such land claiming a freehold estate therein; or their guardians, when any such heirs or owners are minors.¹ The notice must be in writing; and unless it is given, the proceedings will be set aside.² But it is necessary to give notice only to the tenant of the freehold; tenants for years are not entitled to notice.³ The notice may be served personally, on any party of full age; or upon the guardian of minors; or by leaving the same with any person of proper age, at the last residence of such party or guardian, in case of his temporary absence; and if any such heir or owner be a non-resident of the State, the service of such notice may be upon the tenant in actual occupation of the lands; or if there be no tenant, by publishing the same for three weeks successively, in some paper printed in the county where such lands are situated.⁴ And where the owners, or any of them are minors, having no guardian, and a guardian *ad litem* is appointed for the purpose of appearing and taking care of their interests, the notice of the application must be served on such guardian *ad litem*.⁵

5. If the owner of lands subject to dower institute proceedings to compel its admeasurement, a copy of the petition, with notice of the time and place of presenting the same, must be served personally on the widow, twenty days previous to its presentation.⁶

can not proceed under the act for the partition of lands (Sess. 36, c. 100; 1 N. R. L. 507) for the assignment of her dower; nor could she, as the law formerly existed, be made a party to a partition among the heirs, devisees, or grantees of the husband. *Bradshaw v. Callaghan*, 5 John. 80; s. c. 8 John. 435; *Coles v. Coles*, 15 John. 319. But it seems that where the husband was seized as joint tenant, or tenant in common, the widow, as her right of dower extended only to an undivided part, was a proper party to a partition among the several joint owners. *Coles v. Coles*, 15 John. 319. As to the present condition of the law on this subject, see *Barbour on Parties*, p. 290. See, also, ante, ch. ii., § 15.

¹ 2 Rev. Stat. 488, § 2.

² *Matter of Cooper*, 15 John. 533; *Rathbun v. Miller*, 6 John. 281.

³ *Ward v. Kilts*, 12 Wend. 137. See ante, ch. vi., § 24. Notice to the tenant or person in possession merely is insufficient. *Stewart v. Smith*, 39 Barb. 167.

⁴ 2 Rev. Stat. 488, § 3.

⁵ 2 Rev. Stat. 488, §§ 4, 5; *Crary*, Special Proceedings, 3, 4.

⁶ 2 Rev. Stat. 489, § 8.

6. Where, in proceedings before a surrogate, due notice of the application was given to the tenant, who did not attend before the surrogate, and the latter appointed three commissioners according to the statute, but on ascertaining that one of them could not serve by reason of ill health, substituted another in his place; it appearing from the surrogate's return that both the first appointment and the substitution took place on the day for which the application was noticed;—it was held, that the whole should be regarded as one continuous act, and the substitution, therefore, regular, without any additional notice.¹

7. The court, or surrogate, to whom the application is addressed, may, upon hearing the parties, order the dower of the widow to be admeasured in all the lands of her husband, or in such part as shall be specified in the application.² Three disinterested freeholders are to be appointed commissioners to make the admeasurement; and the order should specify the lands of which dower is to be assigned, and the time at which the commissioners are required to report.³ The order, specifying the time at which the report shall be made, is in the nature of an adjournment or continuance of the proceeding; and, therefore, upon the coming in of the report at the time specified, it may be confirmed, on motion of either party, without notice to the other for that purpose.⁴ If the persons appointed commissioners, or either of them, shall die, resign, or neglect, or refuse to serve, the vacancy may be supplied by a new appointment.⁵ And if the first appointment was made by a surrogate, the new commissioner may be appointed by his successor in office.⁶

8. The proceedings under the statute for the admeasurement of dower, are founded on the assumption that the widow is entitled to dower out of the estate in question, and that it is only to be designated and set off to her. No provision is made for the trial of her title; and it is not competent for the parties interested to contest it. If there be a defence to the claim of the widow, it

¹ *White v. Story*, 2 Hill, 543. *Quære*, as to the regularity of the proceeding, however, had the tenant appeared on the day fixed by the notice, and left the surrogate's office after the first appointment, without being apprised that any further proceedings were contemplated. *Ibid.*

² 2 Rev. Stat. 489, § 9.

³ *Ibid.* § 10.

⁴ *White v. Story*, 2 Hill, 543.

⁵ 2 Rev. Stat. 490, § 12.

⁶ *Gale v. Edsall*, 8 Wend. 460.

must be set up when she brings her action for the recovery of the part assigned to her.¹

9. It was intimated by the court in an early case, that notice of the time of admeasuring the dower is not requisite.² It seems, however, that notice of the proceedings of the commissioners should be given to the owners of the premises, or to their guardians if such owners are minors.³ But where the admeasurers met at the house of the heir and requested him to show the premises, and he refused to have anything to do with the business, this was held a sufficient notice in the first instance, and a waiver of further notice.⁴

10. The commissioners are to obey the order under which they act, and have no power to decide upon the widow's right in the land. And therefore, where the order directs them to set off one-third of certain premises, they have no right to confine their admeasurement to one-sixth, upon the ground that the husband was entitled to only one-half of the land.⁵ Nor are they authorized to make a deduction in consequence of any conveyance of land made by the husband to the wife during the marriage.⁶ But as to the manner of making the assignment, they have the same powers that a sheriff possesses under an execution upon a judgment in dower.⁷

11. At the expiration of thirty days from the date of the confirmation of the report of the commissioners, the admeasurement becomes, unless appealed from, binding and conclusive as to the *location* and *extent* of the widow's right of dower, on the parties who applied for the same, and on all parties to whom notice has been given as provided by the statute.⁸ But the proceedings have no other effect; they are no evidence of title in the widow, nor do they preclude any person from controverting her right to dower. If, after the admeasurement, the widow bring ejectment to recover possession of the part assigned to her, the validity of her claim, the

¹ Matter of Watkins, 9 John. 245; Hyde v. Hyde, 4 Wend. 630; Parks v. Hardey, 4 Bradf. 15. See ch. vi., § 16.

² Matter of Watkins, 9 John. 245.

³ Crary, Special Proceedings, 8. See 9 How. Pr. R. 71; 23 Wend. 632, 633.

⁴ Matter of Watkins, 9 John. 245.

⁵ Coates v. Cheever, 1 Cow. 460.

⁶ Hyde v. Hyde, 4 Wend. 630.

⁷ Coates v. Cheever, 1 Cow. 460; White v. Story, 2 Hill, 543. See the observations of the court in the Matter of Watkins, 9 John. 245.

⁸ 2 Rev. Stat. 491, § 17; Jackson v. Hixon, 17 John. 123; Borst v. Griffin, 9 Wend. 307; Parks v. Hardey, 4 Bradf. 15.

title of her husband, his seizin, and her marriage, may all be controverted and tried.¹

12. *Massachusetts.* The ordinance of the colonial government in 1641,² directed, that when the husband or parents died intestate, the county court of that jurisdiction where the party had his last residence, should have power to assign to the widow such part of his estate as they should adjudge just and equal, and also to assign and divide to the children, their several parts and portions. But this was regarded rather as a provision for an allowance of sustenance, than for an assignment of dower; for as soon afterwards as 1647,³ provision was made for the assignment of dower as at common law, by writ at the suit of the widow.⁴

13. Under the provincial government established by the charter of William and Mary, the probate courts succeeded to the county courts in the jurisdiction of the goods and effects of deceased persons; and the general court, by the statute of distributions enacted in 1692,⁵ empowered judges of probate "to order and make a just distribution of the surplusage, or remaining goods and estate, as well real as personal," in the manner therein directed. This distribution was to be, "one-third part of the personal estate to the wife of the intestate for ever, besides her dower or thirds in the houses and lands during life, where such wife shall not be otherwise endowed before marriage; and all the residue of the real and personal estate by equal portions to and among his children. . . The division of houses and lands to be made by five sufficient freeholders upon oath, or any three of them, to be appointed and sworn by the judge for that end." This was construed to be an authority to assign dower, either as a part in the distribution of the real estate, or as a reservation therefrom in the distribution among the heirs. For, by a posterior act,⁶ judges of probate were directed and empowered, when they made out their warrants for the division of any real estate, or for setting off the widow's thirds, to direct a separation, where it lay in common with the estate of any other person.

¹ *Matter of Watkins*, 9 John. 245; *Jackson v. Randall*, 5 Cow. 168; *Jackson v. Waltermire*, *Ibid.* 299; *Jackson v. Dewitt*, 6 Cow. 316; *Parks v. Hardey*, 4 Bradf. 15. See *Borst v. Griffin*, 9 Wend. 367; *Ward v. Kilts*, 12 Wend. 137; *Wood v. Seely*, 32 N. Y. 105; *ante*, ch. vi., § 16.

² 2 Mass. Stat. App. p. 967.

³ *Ibid.* p. 964.

⁴ See *ante*, ch. vi., § 7.

⁵ 4 Will. & Mary, c. 2; 2 Mass. Stat. App. p. 969.

⁶ 2 Mass. Stat. App. p. 981.

14. In the revision of the ancient provincial acts, made after the revolution, by the legislature of the commonwealth, what regarded the distribution of the estates of intestates, was chiefly comprised in the statute of 1783, c. 36, directing the descent of intestate estates, and empowering the judge of probate to make partition in certain cases. By that statute, lands and tenements descended to and among the children, or the legal representatives of deceased children; or to collateral heirs, when there were no children or descendants of the intestate. But it was declared, that "the widow of the deceased shall in all cases be entitled to her dower, and to a recovery of the same in the manner as the law directs." And after the payment of debts, the probate judge of the county was to cause the residue to be divided, and partition thereof to be made to and among the children or heirs, as the law directed. And that this was intended as an authority to assign dower, appears from the eleventh section of the same statute, which contains a provision similar to that before recited. Judges of probate were directed, when they made out their warrants for the division of the real estate among the heirs, or for the assigning of dower, to direct the commissioners to sever the real estate from any estate of another person with which it lay in common.

15. In remarking upon these enactments, Sewall, J., said:¹ "It is, I believe by these indirect and implied provisions, that judges of probate have exercised the authority of assigning dower to the widows of intestates. And when restricted to the lands and tenements of which the intestate died seized, and to a partition between the widow and descendants, or to the widow and collateral heirs of the intestate, and to cases where no contest is suggested, the process for the purpose is both economical and convenient. And under such circumstances it may be considered as a jurisdiction by which the judge of probate affords its aid and sanction to an assignment of dower, with the consent of the parties concerned. But in contested cases, and especially where the intestate was not, at his death, the tenant of the fee, where his heirs have no interest or concern in the assignment of dower; and where strangers, not presumed to be conversant of the proceedings in the probate court, have the whole interest and property, subject to the claim of dower; where the probate court is incompetent to any other purpose of

¹ 1 *Sheafe v. O'Neil*, 9 Mass. 9, (1812).

partition, a jurisdiction to assign dower would be as inexpedient as it is unnecessary. It would also be contrary to the principles of common justice to consider proceedings for such a purpose as conclusive against a stranger to the administration of the deceased's effects, holding the estate under a title obtained from him in his lifetime. For such a case, a writ of dower is the suitable, and the only adequate remedy, after a demand made, and a refusal to assign."

16. In accordance with the views above expressed, it is now settled law in Massachusetts, that a judge of probate has no authority to assign dower except in cases where the husband died seized; and a mortgage by the husband is regarded as such a conveyance as will deprive the probate court of jurisdiction.¹ Nor has that court power to assign dower where the right of the widow is disputed by the heirs or devisees of the husband.² But under the revised statutes, if the husband die in possession of an estate mortgaged by him, the widow is entitled to have dower assigned to her upon petition to the probate court, provided no objection is made by the mortgagee, or by the heirs or devisees of the husband.³ So an assignment of dower by that court, in lands under mortgage, is valid against an heir who consents in writing, the mortgagee making no objection, although such heir also claims under an assignment from the mortgagee.⁴

17. The statute directs that the dower may be assigned in whatever counties the lands lie, by the probate court of the county in which the estate of the husband is settled; and the court shall for that purpose issue a warrant to three discreet and disinterested persons, authorizing them to set off the dower by metes and bounds when it can be so done without damage to the whole estate.⁵ In appointing the commissioners, the probate judge is not confined to freeholders of the county where the husband last dwelt.⁶ If there be a regular record in the probate court of an assignment of dower, such assignment, in the absence of proof either way, will be pre-

¹ *Sheafe v. O'Neil*, 9 Mass. 9; *Raynham v. Wilmarth*, 13 Id. 414; Rev. Stat. Mass. c. 60, §§ 1-3; Gen. Stat. Mass. c. 90, § 3.

² *Ibid.*

³ *Henry's case*, 4 Cush. 257; Mass. Rev. Stat. c. 60, § 3; Gen. Stat. Mass. c. 90, § 3.

⁴ *Draper v. Baker*, 12 Cush. 288.

⁵ Gen. Stat. Mass. c. 90, § 3.

⁶ *Miller v. Miller*, 12 Mass. 454.

sumed to have been made with the knowledge and upon the application of the widow.¹

18. *Maine.* The statute of Maine, like that of Massachusetts, empowers the judge of probate for the county in which the husband's estate is settled, to issue his warrant to three commissioners for the assignment of dower to the widow in the lands of which her husband died seized, when her right is not disputed by the heirs or devisees.² And where no question is made concerning the regularity of the proceedings in the probate court, and no appeal is taken, the decree of that court is final.³ But an assignment of dower under the statute, binds only the heirs and devisees of the husband, and those claiming under them, and they alone have a right to appeal therefrom.⁴ In order to render the assignment effectual, the commissioners should make return of their proceedings;⁵ but if the widow enter into possession of the premises assigned by them, and hold the same without objection for many years, the court will infer that the assignment was made with the consent of the heirs, and if it be not inequitable, will not disturb it merely because there was no return.⁶

19. *Pennsylvania.* In Pennsylvania, provision is made by statute for the partition of intestates' estates by the orphans' court,⁷ and it seems that in all cases where the husband dies seized and possessed of the lands of which dower is claimed, that court alone has jurisdiction and authority to determine and set out the portion of the widow.⁸ But where the husband was seized as tenant in common,⁹ or was not in actual possession of the lands at the time of his death although invested with the legal title,¹⁰ the orphans' court has no jurisdiction to make partition between the widow and children of the intestate, and in such cases the widow may proceed

¹ *Tilson v. Thompson*, 10 Pick. 359.

² Rev. Stat. Maine, 1857, ch. 103, §§ 3, 4; *French v. Crosby*, 23 Maine, 276.

³ *Bent v. Weeks*, 44 Maine, 45.

⁴ *Barton v. Hinds*, 46 Maine, 121.

⁵ *Austin v. Austin*, 50 Maine, 74.

⁶ *Ibid.*

⁷ See Purdon's Dig. by Brightly, pp. 292-297.

⁸ *Thomas v. Simpson*, 3 Barr, 60, 68. See *Bratton v. Mitchell*, 7 Watts, 113. The interest of the widow in the lands of which her husband died seized, is called *statutory dower*. See vol. i., ch. xx., §§ 18, 19.

⁹ *Brown v. Adams*, 2 Whart. 188; *Evans v. Evans*, 9 Barr, 190.

¹⁰ *Galbraith v. Green*, 13 S. & R. 85; *Thomas v. Simpson*, 3 Barr, 60, 68-9; *Evans v. Evans*, 29 Pa. St. (5 Casey), 277.

by the common law action of dower.¹ Nor has the orphans' court power to assign *common law*² dower in any case.³

20. *Vermont.* In this State, the widow, or the executor, administrator, heir, or other person entitled to the estate, may, at any time after the death of the husband, make application to the probate court to have the dower assigned, and the court is required, upon such application to appoint three disinterested freeholders as commissioners, who are directed to proceed and set out the dower by metes and bounds, where it can be done without injury to the estate. When their return has been accepted by the court, and entered of record, and an attested copy recorded in the office of the town clerk, the dower is to remain fixed and certain.⁴ Provision is also made for the assignment of dower in proceedings in partition.⁵

21. The probate court has exclusive jurisdiction, under the statute above referred to, of proceedings for the assignment of dower; and if the dowress claim to have a special rule of apportionment, that court alone can establish such rule in her favor. But if the probate court assign dower generally, in an equity of redemption, without determining the proportion which the widow shall pay towards the incumbrance, it is equivalent to saying it shall be in proportion to her estate; and the court of chancery has jurisdiction, upon a bill brought by the dowress for that purpose, to determine the proportion which she should pay, upon the general rule of equity in such cases, except so far as the parties may have varied that rule by an agreement executed at the time.⁶

22. Where dower has been assigned by the probate court, a person not interested in the estate of the deceased, but claiming by paramount title, can not appeal.⁷

23. *Connecticut.* The statute of Connecticut makes it the duty of the heirs, or persons entitled to the estate, within sixty days after the death of the husband, to apply to the court of probate in the district where the will was proved, or administration granted,

¹ See ante, ch. vi., §§ 10-13.

² See vol. i., ch. xx., § 20.

³ *Bradfords v. Kents*, 43 Pa. St. (7 Wright), 474; *Shaffer v. Shaffer*, 50 Pa. St. (14 Wright), 394.

⁴ Gen. Stat. Verm. p. 412, § 7; p. 413, § 8. As early as in 1779, a summary remedy was provided in this State for the assignment of dower in the probate court. Verm. State Papers, pp. 339, 342, 360.

⁵ Gen. Stat. Verm. p. 420, § 13.

⁶ *Danforth v. Smith*, 23 Verm. 247.

⁷ *Hemmenway v. Corey*, 16 Verm. 225.

to have dower assigned to the widow ; the assignment is to be made by three judicious and disinterested persons to be appointed by the court. In case the heirs, or persons entitled to the estate neglect to make application, the court, on complaint of the widow, is required to appoint commissioners to set out the dower. In either case, the doings of the commissioners, when returned to the court and accepted by it, shall ascertain and establish such dower, and all persons concerned shall be concluded thereby.¹

24. *Rhode Island.* In Rhode Island, any court of probate which has granted letters of administration, or letters testamentary on the estate of any deceased person, has power, upon the joint application of the widow of the deceased and of all the heirs at law or devisees having the next immediate estate of freehold, and all persons interested in all or any of the lands lying within the State which belonged to the deceased during his intermarriage, whereof such widow is dowable, to cause her dower therein to be assigned to her. When such application is made, the court shall, in the first instance, decree in what manner the dower ought to be assigned in the premises described in the application, whether by metes and bounds, or in some certain and special manner. Any person aggrieved by the decree may appeal ; but if no appeal be made within the time prescribed by law, or if the parties within that time, waive, in writing, their right to appeal, the decree shall be final. Upon rendering the decree, the court shall appoint three disinterested men, who shall exercise the same duties and powers, and proceed in the same manner, and under the same restrictions, as though they were appointed to set off dower in an action of dower ; and upon their report being made to the court, like proceedings shall be had thereon, and with the same effect, as in an action of dower. But no damages for the detention of dower shall be allowed on such application ; nor shall any appeal be had from a decree affirming the report of the commissioners.²

25. *Delaware.* By the Delaware statute, dower may be assigned by the orphans' court of the county where the land lies, upon the petition of the widow, or of any party interested, by the like pro-

¹ Stat. Conn. 1854, p. 382, § 18. See, also, p. 499, §§ 46, 47 ; p. 504, § 59. An act for the speedy assignment of dower in the probate court, was adopted in 1796. Stat. Conn. (1796,) p. 147.

² Rev. Stat. R. I. 1857, p. 505, §§ 16-18 ; p. 506, § 19.

ceedings, and in the same manner as is by law provided in the case of intestate estates.¹

26. *New Jersey.* The New Jersey statute authorizes any widow entitled to dower in lands of which her husband died seized, or the heirs, or the guardian of any minor children entitled to any estate in such lands, or any purchaser thereof, to apply by petition to the orphans' court of the county where the estate is situate, for the appointment of commissioners to set off the dower. The petitioner is required to give twenty days previous notice, in writing, to the persons interested, and to the guardian (if any) of minor children, of the intended application; the notice must be served personally, or by leaving it at the usual place of abode of the person entitled thereto; if the party is a non-resident of the State, notice may be given by publication. These requisitions being complied with, the court is directed to appoint three discreet and disinterested freeholders of the county to make the assignment. The report of the commissioners, if approved, is to be entered at large by the surrogate in the records of his office, and is made conclusive upon the persons concerned unless set aside or reversed. Where the lands lie in two or more counties, it is made lawful for the ordinary, or surrogate-general, to appoint commissioners to set off the dower therein.²

27. *New Hampshire.* In this State, dower may be assigned by the probate court.³ The probate judge is authorized to cause the dower and share of the widow, and the shares of any or all of the heirs or devisees in the real estate of any person deceased, or any part of it, to be divided and assigned to them in severalty, according to their respective interests.⁴

28. A report by three out of five commissioners appointed by the probate judge to assign dower, if accepted by him, constitutes a valid assignment, though nothing in the report or on the record shows that the other two acted.⁵

29. *Maryland.* In Maryland, provision is made for the assignment of dower by the court of chancery.⁶ In proceedings for

¹ Del. Stat. 1829, p. 164, § 2; p. 168, § 6; Del. Rev. Code, 1852, p. 292, § 16. See *Layton v. Butler*, 4 Harring. 507.

² Nixon's Dig. p. 211, §§ 17-20; p. 212, § 21.

³ N. H. Comp. Stat. 1853, p. 420, § 3. See p. 521, § 7.

⁴ Ibid. p. 424, § 1.

⁵ *Burnham v. Porter*, 4 Foster, 570.

⁶ See ante, ch. vii., §§ 14, 15.

partition, if there be a widow entitled to dower, the commissioners appointed to make partition are required to lay off the dower before they divide the lands.¹

30. *Virginia.* The statute of Virginia provides, that upon the motion of the heirs or devisees, or of any of them, the court in which the will of the husband is admitted to record, or administration of his estate is granted, may appoint commissioners, by whom the dower of the widow may be assigned; and the assignment, when confirmed by the court, shall have the same effect as if made by the heir at common law.²

31. *Ohio.* In Ohio, the statute directs that the application of the widow for an assignment of dower, shall be by petition in chancery.³ But in proceedings by executors or administrators for the sale of real estate to pay debts, if the widow of the decedent is entitled to dower therein, the commissioners appointed to appraise the land must first set out the dower. If the estate will not admit of division, the dower is to be assigned specially, of the rents and profits, and the lands appraised subject thereto.⁴ In proceedings for partition, a widow entitled to dower must be made a party; and the commissioners who make the partition are required to set off to her the share to which she is entitled.⁵

32. It has been held, that where the wife joins her husband in a mortgage containing a renunciation of dower, a sale of the land by the administrator of the husband for the payment of his debts, extinguishes the right of dower in the land, and transfers an unincumbered title to the purchaser.⁶

33. A mortgage was executed by S. and J., his wife, to A. Upon the decease of S. his administrator filed a petition for the sale of the real estate of S., including as a part of the real estate, the premises mortgaged; alleging that A. held a mortgage, and making him and the widow and heirs of S. parties defendant, and further alleging that the widow was entitled to dower. A. was duly served with process; dower for the whole real estate was assigned in that portion of the premises which was covered by the mortgage; sale

¹ 1 Md. Code, p. 341, § 62.

² Va. Code, 1849, p. 475, § 6.

³ 1 Rev. Stat. Ohio, by Swan & Critchf. p. 520, § 9. But see Amendatory Act of March 9, 1866, 63 Ohio Laws, p. 33.

⁴ 1 Rev. Stat. Ohio, by Swan & Critchf. p. 592, § 138; p. 594, § 147; p. 595, § 149.

⁵ Ibid. p. 898.

⁶ St. Clair v. Morris, 9 Ohio, 15.

was made of the same, subject to the dower assigned, and the proceeds thereof paid to A.; and the residue sold, free of dower. It was held, on petition of A., to foreclose the mortgage, that he was concluded, as against the widow, in respect to the dower assigned to her.¹

34. *Illinois*. In this State, the heirs, or if under age, their guardians, or any other persons interested in the real estate, may petition the court to have the widow's dower assigned.² And every woman having a right of dower not assigned, is required to be made a party to proceedings for partition.³

35. *Michigan*. In Michigan, when a widow is entitled to dower in lands of which her husband died seized, and her right is not disputed by the heirs or devisees, or by any person claiming under them, it may be assigned to her, in whatever counties the lands may lie, by the judge of probate for the county in which the estate of the husband is settled, upon application of the widow, or any other person interested in the lands; notice of which application shall be given to such heirs, devisees, or other persons, in such manner as the judge of probate may direct. For the purpose of assigning such dower, the judge shall issue his warrant to three discreet and disinterested persons, authorizing and requiring them to set off the dower, when it can be done without injury to the whole estate. If the return of the commissioners is accepted and recorded, and an attested copy recorded in the office of the register of deeds of the county where the lands are situate, the dower is to remain fixed and certain unless the confirmation is reversed or set aside on appeal.⁴

36. In *Wisconsin*,⁵ *Minnesota*,⁶ and *Oregon*,⁷ the statutory regulations in force on this subject, are identical with those adopted in Michigan, as shown in the preceding section.

37. *Kentucky*. In Kentucky, dower may be assigned by the county court on the application of the widow or heirs, or of any other person who holds a legal interest in the lands.⁸ But that

¹ *Affleck v. Snodgrass*, 8 Ohio St. 234.

² 1 Stat. Ill. 1858, p. 156, § 31.

³ *Ibid.* p. 160, § 3. See *Tibbs v. Allen*, 27 Ill. 119; *Francisco v. Hendricks*, 28 Ill. 64.

⁴ 2 Comp. Stat. Mich. 1857, p. 851, § 8; p. 852, §§ 9, 10.

⁵ Rev. Stat. Wis. 1858, p. 546, §§ 8, 9; p. 547, § 10.

⁶ Stat. Minn. 1858, p. 408, §§ 8-10. See p. 489, § 3.

⁷ Stat. Oregon, 1855, p. 406, §§ 8-10.

⁸ *Shields v. Batts*, 5 J. J. Marsh. 12, 15; *Smith v. Maxwell*, 3 Litt. 471. See 2 Rev. Stat. Ky., by Stanton, ch. 57.

court has no jurisdiction to assign dower, except in cases where the husband died seized and the right of dower is not contested.¹ So where the husband dies possessed of an equity only, the county court can not make the assignment.² But where he has acquired a right to the land by adverse possession, the county court may assign the dower.³ And if an assignment be made without authority, yet if the parties concerned, by long acquiescence adopt it, it will bind them and their alienees.⁴ So where an assignment was made by the county court before it had acquired jurisdiction, and the premises set off were held according to the assignment in good faith, for many years, it was determined that on the discovery of the defect, the chancellor would confirm what had been thus done without authority.⁵

38. It was held in the case of *Williams v. Morgan*,⁶ that the appointment of commissioners for the assignment of dower, is *prima facie* evidence of a lawful application; and that the minutes of the court need not show upon whose application the appointment was made; but in the subsequent case of *Smith v. Maxwell*,⁷ the point was otherwise determined. So it has been decided, that as the jurisdiction of county courts in proceedings for dower, is special, their records must show every fact required by the statute.⁸ But the court of appeals can not decide that a county court erred in quashing the report of an allotment of dower, when the record does not show upon what evidence it acted.⁹

39. It was held in *Stevens v. Stevens*,¹⁰ that an allotment of dower in the county court, is a proceeding *in rem*, operating as a general notice, and that no other notice is necessary. But in *Holderman v. Holderman*,¹¹ it was decided, that under the act of 1811,¹² notice must be given to all persons interested, of the application for the assignment of dower, and also of any change proposed to be made in the commissioners appointed for that purpose.

¹ *Rintch v. Cunningham*, 4 Bibb, 462; *Hawkins v. Page*, 4 Mon. 136; *Williams v. Williams*, 1 J. J. Marsh. 105; *Taylor v. Lusk*, 7 J. J. Marsh. 636; *Stevens v. Stevens*, 3 Dana, 371; *Murphey v. Murphey*, 7 B. Mon. 232; *Garris v. Garris*, *Ibid.* 461.

² *Hawkins v. Page*, 4 Mon. 136.

³ *Ibid.*

⁴ *Robinson v. Miller*, 1 B. Mon. 88; s. c. 2 B. Mon. 284.

⁵ *Wood v. Lee*, 5 Mon. 50.

⁶ *Williams v. Morgan*, 1 Litt. 167.

⁷ *Smith v. Maxwell*, 3 Litt. 471.

⁸ *Stevens v. Stevens*, 3 Dana, 371.

⁹ *Smith v. Smith*, 5 Dana, 179.

¹⁰ *Stevens v. Stevens*, 3 Dana, 371. See, also, *Rintch v. Cunningham*, 4 Bibb, 462.

¹¹ *Holderman v. Holderman*, 5 B. Mon. 384.

¹² Stat. Laws, 1071.

40. Where an order appointing commissioners to assign dower has been set aside, and other commissioners appointed in their place, any report the commissioners first appointed may thereafter make will be void, and can not be rendered valid by the court approving and ordering it to be recorded.¹ But the power of the county court over the report of the commissioners ceases with the term at which it was ordered to record; and where a report has been made, confirmed, and ordered to be recorded, the court can not set it aside at a subsequent term.²

41. *Mississippi*. By the statute of Mississippi, any widow claiming dower may file her petition in the probate court of the county where her husband shall have usually dwelt next before his death, setting forth the nature of her claim, and particularly specifying the lands of which she demands dower, and praying that her dower may be allotted to her; whereupon the court shall order a summons to the executor or administrator, and the heirs or devisees, or their guardians, if they be minors, returnable to the next term of the court; and upon the return of the process executed, shall proceed to hear the petition; and if the petition be granted, the court shall issue a writ, directed to the sheriff of the county, commanding him to summon three discreet freeholders, not connected with the parties by consanguinity or affinity, and entirely disinterested, who, upon oath to be administered by the sheriff, shall allot and set off by metes and bounds to the widow her dower in the lands of her deceased husband, and the sheriff shall put her in possession of the same. And when she has claim to dower in lands lying in different counties, she may proceed in the same way, in the probate court of the county in which such lands lie, and may recover as above provided. In case the widow is executrix or administratrix, and also guardian to the children, if there be any, then no summons shall be necessary, unless there be adult heirs and devisees also. The sheriff and commissioners are required to make their report to the court, and the same is directed to be recorded.³

42. Any heir, or other person having an interest or share in the lands of the decedent, may, in like manner, petition the probate

¹ *Smith v. Maxwell*, 3 Litt. 471. Commissioners to assign dower ought to be sworn before they act; if not sworn until afterwards, the proceeding will be erroneous, but not void. *Hawkins v. Craig*, 6 Mon. 254.

² *Holderman v. Holderman*, 3 B. Mon. 532.

³ *Rev. Code Missis.* 1857, p. 469, art. 173.

court of any county in which such lands lie, to have the widow's dower assigned to her, in case she shall fail or refuse to make application therefor in a reasonable time; and in such cases a summons shall be served on the widow, as well as other persons interested; and the court shall hear the petition, and order the allotment of dower, as though the widow had applied.¹

43. By virtue of these provisions, the probate court has full jurisdiction in proceedings for the assignment of dower.² And where the widow proceeds in that court, the representatives of the deceased husband are the only proper parties to the petition.³ And they are the only persons who can contest her right to dower in such proceeding.⁴ If there be proof of marriage, of the seizin of the husband during the coverture, of non-alienation on the part of the wife, and of the death of the husband, the widow, as against his representatives, will be entitled to dower. As to them the judgment will be binding and conclusive.⁵ But it is not competent for the probate court to adjudicate upon conflicting rights, in proceedings for dower; and therefore, a stranger who would resist the claim of the widow on the ground of paramount title in himself, can not be heard in that court; but must resort to his appropriate legal remedy after the allotment is made.⁶ If litigants submit the question of title to the probate court, and permit a decision to be made without objection, such consent will confer no jurisdiction, and the judgment will be void.⁷ Nor has that court jurisdiction to enter into an inquiry whether a widow applying for dower has tortiously appropriated property of her husband, and on that account is not entitled to dower.⁸

44. The probate court is not ousted of its jurisdiction of the subject of dower by the fact that the property of which the widow seeks to be endowed, is in the adverse possession of another.⁹ In such

¹ Rev. Code Missis. 1857, p. 470, art. 175.

² *Randolph v. Doss*, 3 How. 205; *Caruthers v. Wilson*, 1 S. & M. 527; *Bisland v. Hewett*, 11 S. & M. 164; *Caillaret v. Bernard*, 7 S. & M. 316.

³ *James v. Rowan*, 6 S. & M. 393; *Bisland v. Hewett*, 11 S. & M. 164.

⁴ *Pickens v. Wilson*, 13 S. & M. 691.

⁵ *James v. Rowan*, 6 S. & M. 393; *Pickens v. Wilson*, 13 S. & M. 691.

⁶ *Pickens v. Wilson*, 13 S. & M. 691; *Ware v. Washington*, 6 S. & M. 737; *James v. Rowan*, *Ibid.* 393; *Holloman v. Holloman*, 5 S. & M. 559.

⁷ *Holloman v. Holloman*, 5 S. & M. 559.

⁸ *Caruthers v. Wilson*, 1 S. & M. 527.

⁹ *Bisland v. Hewett*, 11 S. & M. 164; *Pickens v. Wilson*, 13 S. & M. 691.

case, the court will have no jurisdiction of the person in possession; nor will his appearance and answer confer such jurisdiction.¹ It is the duty of the court, however, to allot the dower to the widow, and leave the adverse claimant to contest her right in the courts having power to determine such controversies.² But a decree of the probate court awarding dower will not be binding upon one claiming by title paramount to that of the husband;³ and this even though he appear and answer in the case.⁴ Upon the allotment of dower in lands claimed by and in the possession of a third party by alleged paramount title, the remedy of the dowress is to assert her right, and recover possession by ejectment; and if the widow be in possession, the claimant's redress is by like remedy. In such proceeding, the claims of the respective parties will be considered in a great degree as if no decree of the probate court had been pronounced.⁵

45. An order allotting dower at the instance of the widow, made without notice, is void, and is no bar to the right of any one.⁶ And where the widow is the executrix or administratrix of her deceased husband, if she obtain a judgment or decree for dower, without giving notice of the filing of her petition by an advertisement in one of the newspapers published in the State nearest to her residence, such judgment or decree will not be binding.⁷ Objection to the pleadings must be taken before trial on the merits, or the appellate court will not inquire into their irregularity.⁸ And where the widow enters into a second marriage, and afterwards files her petition for dower in her own name, without joining her husband, this will not render the proceeding void; but if an exception were urged at the proper time and in the proper manner, it might defeat the action.⁹ Where an order for publication is entered by the probate

¹ *Bisland v. Hewett*, 11 S. & M. 164.

² *Farmers & Mech. Bk. v. Tappan*, 5 S. & M. 112; *Holloman v. Holloman*, Ibid. 559.

³ *Farmers & Mech. Bk. v. Tappan*, 5 S. & M. 112; *Holloman v. Holloman*, Ibid. 559; *James v. Rowan*, 6 S. & M. 393; *Bisland v. Hewett*, 11 S. & M. 164; *Pickens v. Wilson*, 13 S. & M. 691.

⁴ *Bisland v. Hewett*, 11 S. & M. 164.

⁵ *James v. Rowan*, 6 S. & M. 393; *Bisland v. Hewett*, 11 S. & M. 164; *Pickens v. Wilson*, 13 S. & M. 691; *Farmers & Mech. Bk. v. Tappan*, 5 S. & M. 112; *Holloman v. Holloman*, Ibid. 559. See *Ware v. Washington*, 6 S. & M. 737.

⁶ *Farmers & Mech. Bk. v. Tappan*, 5 S. & M. 112.

⁷ *Muirhead v. Muirhead*, 23 Missis. 97.

⁸ *Woodbridge v. Wilkins*, 3 How. 360.

⁹ *Turner v. Morris*, 27 Missis. 733.

court, on the filing of a petition for dower, it will be presumed, in the absence of any evidence to the contrary, that the publication was made.¹ A bill of review can not be filed in the probate court.²

46. *Alabama.* In Alabama, any widow claiming dower, may file her petition in the circuit or county court, in the county where the husband usually dwelt next before his death, setting forth the nature of her claim, and particularly specifying the lands of which she demands dower, and praying that her dower may be allotted to her; whereupon the court shall issue a writ to the sheriff, commanding him to summon five discreet freeholders, as commissioners, connected with the parties neither by consanguinity nor affinity, and entirely disinterested, who, upon oath shall allot and set off by metes and bounds to the widow, one-third part according to quantity and quality of all the lands of which she is dowable, situate in the county, and shall put her in possession of the same; when she is entitled to dower in lands lying in different counties, she may proceed in the circuit or county court of the county where such lands lie. The statute directs, that the proceedings upon the petition shall be summary; and the court shall, at their first term when such petition is filed, proceed to hear and determine the same, as to them shall seem just and right. But the petitioner for dower is required to give ten days previous notice to the executors or administrators, by serving them with a copy of the petition; and where there are no executors or administrators, or where they do not reside in the county of the residence of the widow, or where the widow is the executrix or administratrix, she must give notice by publication.³

47. The probate court has jurisdiction to assign dower in lands of which the husband died seized.⁴ But an allotment of dower can not be made under the statute except in cases where it can be designated by metes and bounds.⁵ Neither the orphans' court nor

¹ *Randolph v. Doss*, 3 How. 205.

² *Farmers & Mech. Bk. v. Tappan*, 5 S. & M. 112.

³ *Clay's Ala. Dig.* p. 173.

⁴ *Thrasher v. Pinckard*, 23 Ala. 616; *Sherard v. Sherard*, 33 Ala. 488; *Martin v. Martin*, 22 Ala. 86; *Owen v. Slatter*, 26 Ala. 547. See *Nance v. Hooper*, 11 Ala. 552; *Barney v. Frowner*, 9 Ala. 901. An appeal lies from a decree of the probate court giving a widow a certain portion of the proceeds of land sold in lieu of dower. *Sherard v. Sherard*, 33 Ala. 488. See ch. xxiii., § 10; ch. xxiv., §§ 1, 2. The code, § 2396, requiring non-residents to give security for costs, does not apply to a petition for dower in the probate court. *Forrester v. Forrester*, 35 Ala. 594.

⁵ *Barney v. Frowner*, 9 Ala. 901.

the circuit court possesses power under the statute to award damages to the widow upon an allotment of dower. The court of chancery is alone competent to extend such a measure of relief.¹ Nor can the widow recover mesne profits in the probate court.² And when application is made for an allotment of dower and distribution of the personal estate, in the county court which has possession of the will by probate, and the will is inconsistent with such claim, there is a defect of jurisdiction in the court to act upon the petition, unless the fact of dissent from the will is shown affirmatively.³

48. In the exercise of its summary jurisdiction over the subject of dower, the court of probate has no equity jurisdiction, but proceeds according to the rules of law; so that, if the demandant have a legal right to dower it is the duty of the court to allot it, irrespective of considerations which are purely of equitable cognizance. Nor has that court jurisdiction to go into an inquiry whether the lands in which dower is claimed, were purchased by the deceased husband with money obtained by him from a woman with whom, after a voluntary separation between him and the demandant, he had contracted a supposed marriage, and with whom, as his lawful wife, he lived until his death.⁴

49. The statutory jurisdiction of the court of probate, upon the allotment of dower, is in derogation of the common law, and the proceedings must therefore conform to the statute in every essential particular.⁵ The widow can not proceed against several alienees of the husband by the same petition.⁶ Her petition must set forth the nature of the claim, and specify the lands of which she seeks to be endowed, and aver that they lie in the county where the petition is filed. It must allege the marriage, the seizin of the husband during the coverture, and his death. It must also show whether the deceased died testate or intestate; who are his heirs; who his personal representatives, if any; and who the tenants of the freehold; the record must also show that the necessary parties are before the court.⁷ An allegation in the petition that the

¹ *Weaver v. Crenshaw*, 6 Ala. 873; *Smith v. Smith*, 13 Ala. 329.

² *Slatter v. Meek*, 35 Ala. 528.

³ *McLeod v. McDonnell*, 6 Ala. 236.

⁴ *Martin v. Martin*, 22 Ala. 86.

⁵ *Ibid.*; *Thrasher v. Pinckard*, 23 Ala. 616; *Green v. Green*, 7 Porter, 19; *Barney v. Frowner*, 9 Ala. 901.

⁶ *Barney v. Frowner*, 9 Ala. 901. See ch. vi., §§ 21-25.

⁷ *Aik. Dig.* p. 133, § 5; *Johnson v. Neil*, 4 Ala. 166; *Green v. Green*, 7 Porter,

demandant is the *widow* of the decedent, is not a sufficient averment of their marriage.¹ So an allegation that the decedent died in the county in which the petition is filed, "seized and possessed of the following lands," is not a sufficient averment that the lands are situated in the county.² So an allegation that certain named persons "are his only legitimate children," is not a sufficient averment that they are the only heirs at law of the decedent.³ But when a petition for dower is defective for want of the proper parties and necessary allegations, it may be amended; and in such case, the appellate court will not dismiss the petition, but will remand the cause, that the proper amendments may be made.⁴ And when dower is assigned out of adjoining lands lying in contiguous counties, the party at whose instance it is done, can not afterwards complain that the court had no jurisdiction to make an allotment out of the county.⁵ So an assignment of dower, though irregularly made, to which the wife has given her assent, will be obligatory upon her; especially if she has taken possession of the lands allotted to her, and there is no evidence that she has been overreached by fraud.⁶

50. Upon petition by the widow, her right to dower may be ascertained by the court, those claiming adversely being cited to contest it; and when the allotment is made, she is to be put into actual possession.⁷ Notice to the executor or administrator, that he may contest the claim of the demandant, and public notice in the gazette, if the demandant be herself the executrix or administratrix, or there be no tenant in possession, or the person claiming the fee be not in reach of process, are necessary parts of the proceeding.⁸ It seems, however, that the executor or administrator is not constituted a defendant to protect the rights of those who claim an interest in the freehold; nor will those interested be concluded by his action, or by his failure to act.⁹ The heir, or terretenant, is required to be notified; and any defence which he could

19; *Barney v. Frowner*, 9 Ala. 901; *Martin v. Martin*, 22 Ala. 86. See *Earle v. Jazan*, 7 Ala. 474.

¹ *Martin v. Martin*, 22 Ala. 86.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

⁵ *Adams v. Barron*, 13 Ala. 205.

⁶ *Johnson v. Neil*, 4 Ala. 68. See ch. iv., §§ 29, 30.

⁷ *Barney v. Frowner*, 9 Ala. 901.

⁸ *Clay's Dig.* 173, § 6; *Aik. Dig.* 132; *Green v. Green*, 7 Porter, 19; *Barney v. Frowner*, 9 Ala. 901. See *Earle v. Jazan*, 7 Ala. 474.

⁹ *Green v. Green*, 7 Porter, 19.

make to the claim of the widow if she proceeded at law, will be available to him under the summary proceeding.¹ But the executor or administrator may show cause against the claim of the demandant to the personal estate of the deceased husband, by making known that the estate is not finally settled; or that there are outstanding debts; or by showing any claim he may have under the will; or that the land is a term, and not a freehold; but for any other purpose he has no right to contest the claim of the widow, and will be considered a mere volunteer.² Nevertheless, when he has been cited by process of the court to appear and contest the claim of the widow, he can not be amerced in the costs.³

51. Notice of the time of the confirmation of the report of the commissioners, is not necessary. If any injury is done by such confirmation, a motion should be made in the same court to set it aside.⁴

52. One not a party to a proceeding in the county court upon a petition for the admeasurement of dower, can not prosecute a writ of error to reverse the judgment. It seems that the proper remedy for a person aggrieved by the judgment of the county court in such a case, is to remove it by certiorari to the circuit court.⁵

53. The statute providing a summary remedy for the recovery and assignment of dower, is cumulative, merely, and does not exclude all other modes;⁶ nor is the jurisdiction of the courts of chancery affected thereby.⁷

54. *North Carolina.* In North Carolina, any widow claiming dower, may file her petition in the county court, or superior court of the county where her husband usually dwelt, setting forth the nature of her claim, and describing the lands of which she seeks to be endowed, and praying that her dower may be assigned. It is made the duty of the court thereupon to issue a writ to the sheriff of the county where the lands are situate, commanding him to summon twelve freeholders, unconnected with the parties by consanguinity or affinity, and entirely disinterested, who, upon oath, shall allot to the widow the portion to which she is entitled. In case the lands lie in several counties, the court shall issue a writ to

¹ *Barney v. Frowner*, 9 Ala. 901; *Green v. Green*, 7 Porter, 19.

² *Green v. Green*, 7 Porter, 19.

³ *Ibid.*

⁴ *Adams v. Barron*, 13 Ala. 205.

⁵ *Earle v. Jazan*, 7 Ala. 474.

⁶ *Johnson v. Neil*, 4 Ala. 166; *Owen v. Slatter*, 26 Ala. 547.

⁷ *Owen v. Slatter*, 26 Ala. 547. See *Slatter v. Meek*, 35 Ala. 528.

the sheriff of the county wherein the petition is filed; and he may summon a jury from any or all the counties in which the lands are situate, who shall allot the widow her dower in all the lands. The statute further provides, that the proceedings shall be summary; and that the court shall, at the first term when the petition is filed, hear and determine the application as shall seem just and right. The heirs and devisees are entitled to ten days previous notice, and must be served with a copy of the petition.¹

55. If the widow be entitled to dower in lands situate in North Carolina, and also in lands in other States, and she can not obtain an assignment without suit, if her husband was, at the time of his death, a resident of North Carolina, or not a resident of either of the States in which his lands lie, and in this last case, the most valuable part of his lands shall be in North Carolina, then the widow may proceed and obtain her dower in all the lands of her deceased husband lying in North Carolina and in other States as above mentioned, in the same manner, and under the same rules, regulations and restrictions, as are prescribed for obtaining partition of lands devised or descended to any persons as tenants in common when such lands lie in North Carolina and in other States as above set forth.²

56. Although the statute gives to the widow a more direct and summary remedy than the writ of dower at common law, it does not deprive courts of equity of their jurisdiction over the subject; on the contrary, the intention was to furnish a cumulative remedy, and the widow has an election to proceed in either mode.³

57. It is sufficient to allege in the petition, that the husband died seized of the lands. It is not necessary to state that the heirs entered as heirs, nor to set forth deeds executed by the husband to them in his lifetime, and allege that they were fraudulent as to the widow. Upon the trial of the issue, if made by the answer and replication, whether he died seized or not, the question of fraud will arise.⁴

58. Where an allotment of dower was made without previous

¹ Rev. Code N. C. 1855, p. 601, § 2; p. 602, § 4. Assignment of dower in an equity of redemption may be had by a summary proceeding under this statute. *Campbell v. Murphy*, 2 Jones, Eq. 357, 359.

² Rev. Code N. C. 1855, p. 602, § 7.

³ *Campbell v. Murphy*, 2 Jones, Eq. 357.

⁴ *McGee v. McGee*, 4 Ired. L. 105; *Littleton v. Littleton*, 1 Dev. & Bat. 327; *Norwood v. Marrow*, 4 Dev. & B. 442.

notice to the heir, who was an infant, it was held, that whatever might be the right of the heir or those claiming under him, to reverse or set aside the assignment, it was nevertheless good against a stranger, when accompanied with seven years possession.¹

59. In a proceeding under the statute by the widow, the suit is at an end by the judgment of the court awarding dower.² And where the jury have made a report, and that report has been confirmed, the heirs can not, at a subsequent term, file a petition to set aside the assignment. If there be error in the proceedings, the redress, if any, is in another form.³

60. *Arkansas*. The statute of Arkansas provides, that if dower be not assigned to the widow within one year after the death of her husband, or within three months after demand made therefor, she may file in the court of probate,⁴ her petition, setting forth a description of the lands of which she claims dower, and their probable value. The heirs, or persons holding the reversion, (and if they be minors, then their guardians), and the executor or administrator, must be made defendants. Upon the filing of the petition, the clerk is required to issue a summons directed to the sheriff of the county where the defendants reside, requiring him to summon them to appear at the next term of the court and answer the petition, and show cause, if they can, why the dower claimed, or any part thereof, shall not be assigned to the widow. If the summons be served fifteen days before the term at which it is made returnable, the petition shall be heard and determined at that term, unless, for good cause shown, the court grant a continuance. If the summons be served within fifteen days of the term, the cause shall be heard and determined at the succeeding term; but by consent of parties, it may be tried at the first term. Formal pleadings are not required. The petition is to be taken for confessed against such of the defendants as fail to answer within the first three days of the term to which the summons is made returnable. If, upon the hearing, the court be of opinion that the petitioner is entitled to dower, a decree shall be made, ordering such dower to be laid

¹ *Rayner v. Capehart*, 2 Hawks, 375. ² *Stiner v. Cawthorn*, 4 Dev. & B. 501.

³ *Bowers v. Bowers*, 8 Ired. L. 247.

⁴ Courts of equity are not ousted by this statute of their ancient jurisdiction in proceedings for dower. When the lands in which dower is claimed, lie in different counties, or complicated accounts are to be settled between the parties, chancery is the appropriate tribunal. *Meniffee v. Meniffee*, 3 English, 9.

off.¹ The allotment is to be made by three commissioners appointed by the court; their return, when approved and entered of record, is made conclusive on the parties. When the lands lie in different counties, a petition must be filed in each county where they are situate.² If the defendants reside in different counties, the petition should state the fact; and in such case, a summons is to be issued to each county in which any of them reside. Non-resident defendants are required to be brought in by publication.³

61. *Missouri.* The mode of procedure by the widow to obtain an assignment of dower in this State, has been already shown.⁴ If the widow delay making her application, any heir, legatee, or the guardians of such as are minors, entitled to any interest in the lands, or the executor or administrator of the deceased, or any creditor of the widow, and after her marriage, any creditor of her husband, or any other person having an interest in the lands, may apply by petition to the circuit court of the county wherein the principal messuage is situate; or if there be no such messuage, then in any county in which any of the lands lie, for the assignment of dower, giving twenty days notice in writing of the application to the widow, by personal service, or by copy left at her usual place of abode. Upon due proof of notice, the court is required to appoint three commissioners to assign the dower. The statute forbids any judgment for damages upon such application; and the costs are to be apportioned among the parties concerned according to their respective interests.⁵

62. *Kansas.* In Kansas, the foregoing provisions of the Missouri statute have been adopted, and are in force.⁶

63. *Tennessee.* In Tennessee, the county court at any of its sessions, has concurrent jurisdiction with the circuit and chancery courts, of applications for dower.⁷ Before making the application,

¹ An appeal lies to the circuit court from the decree of the probate court. *Hill v. Mitchell*, 5 Ark. 608.

² The court of probate of one county has no jurisdiction to assign dower in lands in another county. *Crabtree v. Crabtree*, 5 Ark. 638.

³ Dig. Stat. Ark. 1858, p. 455, §§ 33-42; p. 457, §§ 43-47.

⁴ See ch. vi., § 19, and ch. vii., § 14.

⁵ 1 Rev. Stat. Misso. 1855, p. 676, § 38; p. 677, § 39. As to the mode of proceeding when the widow and children of an intestate desire partition and an assignment of dower, see 2 Rev. Stat. Misso. 1855, ch. 119, §§ 54-62.

⁶ Comp. Laws Kansas, 1862, p. 483, §§ 27, 28.

⁷ No appeal lies from the county court to the circuit court upon an order of the

the widow is required to give to the personal representative, if one has been appointed, and to the heirs and devisees resident in the State, five days notice in writing, of her intended application; and if there be any minor interested, his guardian must be notified;¹ and if no guardian has been appointed, it is made the duty of the court to act as guardian *ad litem* of the minor. It is not necessary to give notice to non-residents; but non-residents interested in the estate are allowed three years from the date of the application for dower within which to move a rehearing of the cause; of which motion the personal representative, and heirs or devisees resident in the State, shall have five days notice in writing.²

64. The widow may make application verbally, or in writing, to any one of said courts, in the county where her husband last resided before his death, for the appointment of two freeholders or householders of the county, unconnected by affinity or consanguinity with those interested in the estate of the deceased, to allot and set apart, in connection with the county surveyor, or his deputy, or any competent person to act as surveyor, to the applicant, her dower according to law. The proceedings upon such applications, are summary, and the statute directs that they shall be heard and determined at the first term after notice.³

65. The clerk of the court shall, within forty days after the adjournment, deliver to the surveyor a copy of the order, and thereupon he shall notify the two commissioners of the time and place, to be designated by himself, of laying off the dower; before entering upon which duty, the surveyor shall administer to them an oath for the true and faithful performance of the same. Should any of the lands of which the applicant is entitled to be endowed, lie out of the county where the application is made, the commissioners, if so directed in the order of the court, shall take them into the estimate. They are also required, in their report, to exhibit a

former awarding dower, and appointing commissioners to allot the same. If such proceeding be contested, the contestants have no right of appeal until the final disposition of the matter by the county court. *Rutherford v. Richardson*, 1 Sneed, 609.

¹ In a proceeding to have dower assigned, where there are minor children of the intestate, the proper practice after notice of such proceeding to the minors, is for their guardian to answer and make true and proper defences, if any exist. The service of notice upon the guardian, and his failure to make defence, does not authorize an order *pro confesso* against the infants. *Rutherford v. Richardson*, 1 Sneed, 609.

² Code Tenn. 1858, p. 474, §§ 2407-2410.

³ Ibid. §§ 2411-2413.

plat of the dower, and to plainly set forth the same by metes and bounds where the dower can be so assigned; and if their report is confirmed, the clerk shall enter it in full with the plat on the records of the court. The costs are to be paid by the applicant.¹

66. Whenever heirs petition for a partition of lands in which the widow is entitled to dower, the dower shall first be allotted, upon motion or petition, before the partition is decreed.²

67. *Georgia*. By the Act of December 21, 1839,³ the superior courts of Georgia have power, upon the written application of any person entitled to dower, to appoint five discreet freeholders of the county in which the application is made, and cause to be issued a writ devised and framed according to the nature of the case, directing such freeholders, or a majority of them, to assign the dower. But such application can not be made until the expiration of three months after the death of the person to whom the lands belonged. The Act of February 21, 1850,⁴ provides, that it shall be sufficient for the applicant to give the representative of the estate twenty days written notice of the intended application.

68. Under the statute of December 7, 1824, in case any person interested shall deny the right of the applicant to dower, (the grounds of which denial shall be plainly and distinctly set forth in writing), the court shall order an issue to be made up, and the same shall be tried by a special jury at the same term, unless it shall appear to the court that a continuance should be granted, which may be allowed for one term, and no longer. And it is declared, that the verdict of the jury shall be final and conclusive between the parties.⁵

69. The persons appointed to set out the dower are required, in every case, to give to the parties in interest ten days notice, if they reside within the State, and if they reside without the State, two months notice, in one of the public gazettes, of the time and place of making the assignment.⁶ They are also directed to return their proceedings to the court at the term next ensuing that at which the writ was granted, there to remain of record; and their action in the premises is to be conclusive upon all the parties concerned, unless some person interested shall show a good and probable cause

¹ Code Tenn. 1858, p. 474, §§ 2415-2418.

³ Cobb's New. Dig. pp. 229, 230.

⁵ Ibid. p. 228, § 2.

² Ibid. § 2414.

⁴ Ibid. p. 231.

⁶ Ibid. p. 229, § 5.

in bar of the confirmation of the assignment, or that the applicant is not entitled to so much as has been assigned; in which case the court shall permit an issue to be made up and tried by a special jury without delay; and if the jury shall find in favor of the return and assignment already made, the same shall stand confirmed; but if they shall find against it, the court shall forthwith award another writ, directing a new assignment, which shall be executed and returned as before directed.¹

70. When the lands in which dower is claimed are situate in different counties, application must be made in the manner above pointed out, to the superior court in each of such counties; and the writs granted shall only extend to the laying off and assigning dower in the lands situate in the county in which the application is made.²

71. It was held, in *Chapman v. Schroeder*,³ that on the application of a demandant for dower under the act of 1824, the owner of the lands is such a party in interest as the statute contemplates shall be notified of the intended application. And where there are two representatives of an estate, both of whom reside in the county and are included in the notice by the widow, both should be served.⁴ The notice is void unless it be given in her name.⁵

72. *Florida.* In Florida, the widow may file her petition for dower in the circuit court or probate court of the county where her husband resided at the time of his death. A writ is to issue to the sheriff, commanding him to summon five disinterested freeholders to assign the dower and put the widow in possession of the same. When the lands lie in different counties, she may proceed in each of the counties in which they are situate. The proceeding is to be summary. Ten days previous notice must be given to the executors or administrators by serving them with a copy of the petition; and where there are no executors or administrators, or where they do not reside in the same county with the widow, or where the widow is the executrix, notice is to be given by publication.⁶

73. *Iowa.* By the act of April 8, 1862,⁷ the right of dower as at common law is abolished, and it is provided that in lieu thereof, one-third in value of all the real estate in which the husband at

¹ Cobb's New Dig., p. 228, § 4.

² Ibid. § 3.

³ *Chapman v. Schroeder*, 10 Geo. 321.

⁴ *Rogers v. Hoskins*, 14 Geo. 16.

⁵ Ibid.

⁶ Thompson's Dig. p. 186, §§ 1, 2.

⁷ Laws of Iowa, 1862, pp. 173-5. See vol. i., ch. ii., § 36.

any time during the marriage had a legal or equitable interest, which has not been sold on execution or other judicial sale, to which the wife has made no relinquishment of her right, shall, under the direction of the court be set apart by the executor or administrator, or heir, as her property in fee simple, on the death of the husband, if she survive him.

74. The share thus allotted to the widow may be set off by the mutual consent of all the parties interested, when such consent can be obtained; or it may be set off by referees appointed by the court. The application for admeasurement by referees may be made at any time after twenty days, and within ten years after the death of the husband, and must specify the particular tracts in which the widow claims an interest, and ask the appointment of referees. The court is required to fix the time for making the appointment, and to direct such notice to be given to all the parties interested, as it deems proper.¹

75. It is made the duty of the referees to cause the widow's share to be marked off by metes and bounds, if the estate will admit of division, and to make a full report of their proceedings as early as practicable. If they fail to obey any order of the court, it may discharge them and appoint others in their stead. The court may confirm the report of the referees, or it may set it aside and refer the matter to the same, or to other referees, at its discretion. Such confirmation, after the lapse of thirty days, unless appealed from according to law, shall be binding and conclusive as to the admeasurement, and the widow may bring suit to obtain possession of the land thus set apart to her. But any person interested may controvert the general right of the widow to the share thus admeasured.²

¹ Revision of 1860, §§ 2427-2429.

² Ibid. §§ 2430-2434.

CHAPTER IX.

OF THE EVIDENCE NECESSARY TO ESTABLISH A CLAIM TO DOWER.

§ 1. Matters to be proved.	19-34. Proof of seizin by the husband.
2-14. Proof of the marriage.	35-56. Proof of the husband's death.
15-18. Proof of the time of marriage.	

Matters to be proved.

1. THE demandant in a proceeding for dower, must, unless the issue be in such form as to dispense with proof on one or more of the points on which her right depends, establish, by evidence, her marriage with the person whose widow she claims to be, his seizin during the coverture of such an estate in the lands as entitles her to dower, and his death.

*Proof of the marriage.*¹

2. Direct proof of the marriage is commonly made by the testimony of witnesses present at the celebration, or by an examined or certified copy of the register of the marriage, where such registration is required by law, with proof of the identity of the parties.² The sentence of a spiritual court of competent jurisdiction, in affirmance of a marriage, is the highest evidence of it in the temporal courts.³

3. Direct proof of marriage is not required, except upon the trial of indictments for polygamy or adultery, or in actions for criminal conversation. Nor, except in these instances, is it necessary to prove any license, publication of banns, or compliance with any

¹ The plea *ne unques seised* admits the marriage, and where it is interposed, proof is not required. *Sheppard v. Wardell*, Coxe, 452. See ch. v., § 19.

² For a full exposition of the law relative to the proof of identity, see Hubback, *Ev. of Succes.* ch. 6. It has been held that *ex parte* affidavits made abroad are admissible to prove the identity of parties to a marriage. *Winder v. Little*, 1 Yeates, 152; *Douglass' Lessee v. Sanderson*, *Ibid.* 15; *Lilly's Lessee v. Kintzmiller*, *Ibid.* 28. See, also, 2 Dall. 117. But not if made in another State. *Douglass v. Sanderson*, 2 Dall. 116, 118.

³ Hubback, *Ev. Succes.* 239; 2 Greenl. *Ev.* § 461.

other statute formality, unless the statute expressly require it as preliminary evidence.¹

4. In proceedings for dower, the proof of marriage by the register, or by the testimony of witnesses, is not considered the only best evidence within the rule which requires such evidence to be produced, or its non-production accounted for. Notwithstanding the existence of this evidence, marriage may be proved by reputation and declarations, and may also be presumed from circumstances.²

5. Reputation of marriage may be proved by the testimony of living witnesses speaking to the existence of that reputation, by the declarations of the parties, or their relatives, if deceased,³ and by the conduct of the parties, and of third persons toward them, or by other facts or circumstances indicative of belief and understanding on the subject.⁴

6. The declarations of the husband made during the time the parties were cohabiting as husband and wife, affirming the marriage,

¹ Hubb. Ev. Succes. 239; 2 Greenl. Ev. § 461. See vol. i., ch. vii., §§ 35, 36.

² Young v. Foster, 14 N. H. 114; Stevens v. Reed, 37 N. H. 49; Carter v. Parker, 28 Maine, 509; Harman v. Harman, 16 Ill. 85; Fleming v. Fleming, 8 Blackf. 234; Van Gelder v. Post, 2 Edw. Ch. 577; Spears v. Burton, 31 Missis. 547; Martin v. Martin, 22 Ala. 86; Sellman v. Bowen, 8 Gill & J. 50; Ford v. Ford, 4 Ala. 142; Chapman v. Cooper, 5 Rich. L. 452; Fenton v. Reed, 4 John. 52; Jackson v. Claw, 18 John. 346; Starr v. Peck, 1 Hill (N. Y.), 270; Clayton v. Wardell, 4 Comst. 230; Clements v. Hunt, 1 Jones, L. 400; Cheseldine v. Brewer, 1 Harris & McH. 152; Hantz v. Sealy, 6 Binn. 405; Chambers v. Dickson, 2 S. & R. 477; Copes v. Pearce, 7 Gill, 247; Knowler v. Wesson, 13 Met. 143; Donnelly v. Donnelly, 8 B. Mon. 113; Stover v. Boswell, 3 Dana, 233; Dunbarton v. Franklin, 19 N. H. 257; Yates v. Houston, 3 Texas, 433; Woods v. Woods, 2 Bay, 476; Stevenson v. McReary, 12 S. & M. 9; Taylor v. Robinson, 1 Shepl. 323; Hicks v. Cochran, 4 Edw. Ch. 107; Thorndell v. Morrison, 25 Pa. St. 326; Trimble v. Trimble, 2 Cart. (Ind.) 76; Kenyon v. Ashbridge, 35 Pa. St. 157; Archer v. Haithcock, 6 Jones, L. 421; Chiles v. Drake, 2 Met. (Ky.) 146; Beard v. Travers, 1 Ves. Sen. 313; Read v. Passer, 1 Peake, N. P. C. 233; Hubb. Ev. Suc. 242; 2 Greenl. Ev. § 462; 1 Ibid. § 107. Evidence of reputation and of declarations is admissible against, as well as in support of a marriage. Cooke v. Lloyd, Peake's Ev. App. lxxiv.; Hubb. Ev. Succes. 255; Copes v. Pearce, 7 Gill, 247.

³ Though on a question of marriage and legitimacy, it is competent, in order to prove an heirship asserted, to give in evidence the declarations of any deceased member of *that* family to which the person from whom the estate descends belonged, yet it is not competent to give the declarations of a person belonging to another family,—such person being connected with the person from whom the estate descends only by an asserted intermarriage of a member of each family. Blackburn v. Crawford, 3 Wallace, U. S. Rep. 175.

⁴ Hubb. Ev. Succes. 243. See 1 Phil. Ev. 4th ed. ch. 8, § 4, p. 248, *et seq.*

are admissible as evidence of the fact declared.¹ And a statement in writing, signed by him, is evidence of the same quality as an oral declaration.² Of the same description of evidence are letters of the parties addressing each other as husband and wife, and the will of the deceased husband designating the demandant as his wife.³ So the oral or written declarations of deceased members of the family of the parties, are competent evidence if made *ante litem motam*.⁴ But declarations of marriage can not be given in evidence, unless made by the parties themselves, or by members of the family.⁵ The declarations of a deceased clergyman that he had celebrated a certain marriage are equally inadmissible with those of other strangers in blood or affinity to the parties.⁶

7. It is competent, also, to prove a marriage by the conduct and actions of the parties. Thus, evidence that they eloped and returned as married persons;⁷ that they visited and were received in respectable society as husband and wife,⁸ is held admissible for that purpose. And the mere cohabitation of two persons of different sexes, or their behavior in other respects as husband and wife, always furnishes presumptive evidence that a marriage has been solemnized between them.⁹ If they join as husband and wife in

¹ Hubb. Ev. Succes. 244. See *Pendrell v. Pendrell*, Cas. t  mp. Hardw. 79; 2 Str. 925; Bull. N. P. 113, 294; 8 East, 196, note; 1 Phil. Ev. 4th ed. 251, note 91.

² *Sacheverell v. Sacheverell*, 1 Strange, 35; Hubb. Ev. Succes. 244.

³ *Alfray v. Alfray*, 2 Lee, 547; 6 Eng. Eccl. R. 238; *Hervey v. Hervey*, 2 W. Bl. 877; *Gaines v. Relf*, 12 How. U. S. 472. But assertion of marriage in any of these ways may be controverted. *Sherborne v. Napier*, 2 Ridgw. P. C. 234; *Berkeley Peerage*, 4 Camp. 401; *Kennell v. Abbott*, 4 Ves. Jr. 802; *Giles v. Giles*, 1 Keen, 685, 15 Eng. Ch. R.; *Hubback, Ev. Succes.* 245; 2 Greenl. Ev.    464.

⁴ 2 Stark. Ev. *510; *Fownes v. Ettricke*, 2 Lee, 257; 6 Eng. Eccl. R. 116; *Clements v. Hunt*, 1 Jones, L. 400; *Matter of Hall*, 1 Wallace, Jr. 85; *Copes v. Pearce*, 7 Gill, 247; *Physick's Estate*, 4 Amer. Law Reg. N. S. 418; *Henderson v. Cargill*, 31 Missis. 367; *Spears v. Burton*, Ibid. 547; *Blackburn v. Crawfords*, 3 Wallace, U. S. Rep. 175. It has been decided in Pennsylvania, that declarations of a member of the family to the fact of marriage, are inadmissible when there are living witnesses to the fact of cohabitation as husband and wife. *Covert v. Hertzog*, 4 Barr, 145. And see *Raynham v. Canton*, 3 Pick. 293, 296; *Blackburn v. Crawfords*, 3 Wallace, U. S. Rep. 175; ante,    5, note 3.

⁵ *Johnson v. Lawson*, 9 Moore, 187; s. c. 2 Bing. 86; 9 Eng. C. L. 329.

⁶ *Duch  s of Kingston's case*, 20 How. St. Tr. 592; Hubb. Ev. Succes. 246.

⁷ *Cooke v. Lloyd, Peake, Ev. App.* lxxiv.

⁸ Hubb. Ev. Succes. 247.

⁹ *Rex v. Stockland, Burr, Sett. Cas.* 509; s. c. 1 W. Bl. 367; *Revel v. Fox*, 2 Ves. Sen. 270; *Fleming v. Fleming*, 4 Bing. 266; 13 Eng. C. L. 426; *Hervey v. Hervey*, 2 W. Bl. 877; *Dunbarton v. Franklin*, 19 N. H. 257; *Young v. Foster*, 14 N. H. 114; *Physick's Estate*, 4 Amer. Law Reg. N. S. 418; *Donnelly v. Donnelly*, 8

the conveyance of lands, the alleged wife releasing her dower, this also is a circumstance competent to be considered.¹ So the baptism of children as legitimate tends to warrant the presumption that the parents were married at the time.² A presumption of marriage also arises from the acknowledgment and treatment of children as legitimate upon occasions subsequent to their baptism.³

8. Proof of the observance of customs peculiar to the entry upon or subsistence of the marriage relation is evidence of the same description, and will assist the inference that the contract was duly constituted. By the civil law, the Roman custom of *traductio ad domum* was a conclusive presumption of matrimony,⁴ and by the canon law similar weight was ascribed to it, if observed in places where it was a solemnity usual upon bringing the bride to the residence of her husband.⁵ So in England, the circumstance of the man impaling the woman's arms with his own upon his plate, seals, and carriage, was treated as carrying considerable weight in evidence of marriage.⁶ On the same principle, the assumption by the woman of the name of the man, the wearing by her of the wedding ring, or (in countries where a difference exists) of apparel peculiar to married women, are acts, which, if they be done *sciente, vidente, et patiente viro*, may be considered as so many tacit declarations of the existence of the marriage relation.⁷

9. Where, by the law which governs the marriage, a contract *per verba de præsenti* is valid,⁸ a written instrument containing the terms of such contract is of course admissible and proper evidence.

B. Mon. 113; Jackson *v.* Claw, 18 John. 346; Harman *v.* Harman, 16 Ill. 85; Stevens *v.* Reed, 37 N. H. 49; Stover *v.* Boswell, 3 Dana, 233; Van Gelder *v.* Post, 2 Edw. Ch. 577; Carter *v.* Parker, 28 Maine, 509; Fleming *v.* Fleming, 8 Blackf. 234; Copes *v.* Pearce, 7 Gill, 247; Sellman *v.* Bowen, 8 Gill & J. 50; Ford *v.* Ford, 4 Ala. 142; 2 Stark. Ev. *510; Laws of Iowa, Rev. 1860, § 2477.

¹ Hervey *v.* Hervey, 2 W. Bl. 877; Cooke *v.* Lloyd, Peake, Ev. App. lxxiv.; Hubb. Ev. Succes. 248, 255.

² Bond *v.* Bond, 2 Lee, 45; 6 Eng. Eccl. R. 28; Alfray *v.* Alfray, Ibid. 547. See Braybroke *v.* Inskip, 8 Ves. Jr. 422, 430.

³ Hubb. Ev. Succes. 249. See Carter *v.* Parker, 28 Me. 509. In Mississippi, the granting of letters of administration upon the estate of a decedent, to a woman claiming to be his wife, is *prima facie* evidence of the marriage. Muirhead *v.* Muirhead, 23 Missis. 97.

⁴ Dig. 23, 2, 5.

⁵ Menoch. Pres. 1, lib. 3. And see Moor, 170; 20 How. St. Tr. 548.

⁶ Hervey *v.* Hervey, 2 W. Bl. 877.

⁷ Hubb. Ev. Succes. 247, 248.

⁸ See vol. i., ch. iv.

Thus, the original contract is the proper evidence of a Jewish marriage.¹ In Scotland, the antenuptial contracts were formerly *de futuro*, and although now generally expressed in present terms, yet, as they point to a subsequent celebration, they are construed not to be declarations of present consent, and therefore not perfect marriages.² After the lapse of time, however, they are, when produced from the archives of the family, good presumptive evidence that the intended marriage was contracted. And letters, or other written declarations or acknowledgments, expressive of consent *per verba de præsenti*, are at least evidence, if they do not *proprio vigore* constitute a marriage.³

10. The preliminaries to a marriage may supply grounds for presuming that the principal transaction followed. Marriage articles signed by the parties in contemplation of a marriage shortly to be had, are receivable in evidence as raising a presumption that the contemplated marriage took effect.⁴ In England, the license bond and affidavit book of banns, though not necessary evidence to show that the requisite formalities were complied with, are yet admissible to raise a presumption that a marriage took place, or to throw light on the time or circumstances of it.⁵ In the United States, the bond given by the intended husband as a preliminary to obtaining a license has been held relevant and legal proof for the same purpose.⁶

11. A certificate of marriage by the clergyman or other person in whose presence it was celebrated, is not, of itself, evidence of the statements contained therein, unless it be proved as an examined copy of the register.⁷ But in *Beer v. Ward*,⁸ Ch. J. Dallas said:

¹ *Horn v. Noel*, 1 Camp. 61.

² See *M'Adam v. Walker*, 1 Dow. 133; vol. i., ch. v.

³ *Hubb. Ev. Succes.* 256; *Dalrymple v. Dalrymple*, 2 Hagg. C. R. 54; 4 Eng. Eccl. R. 485. By the civil law, the dotal instruments, as well as the *tabulæ nuptiales*, were evidence of the consent of the parties to the marriage. *Novell.* 18, 4, 1, and 22, 18; *Cod.* 5, 7, 11.

⁴ *Roscommon Earldom*, *Min. Ev.* 36; *Hubb. Ev. Succes.* 257. Civilians also acknowledge that a presumption that matrimony has been contracted is afforded by the instrument of endowment. *Menochius de Pres. lib.* 3, pr. 1.

⁵ *Beer v. Ward*, cited *Hubb. Ev. Succes.* 257; *Birt v. Barlow*, 1 Doug. 171.

⁶ *Martin v. Martin*, 22 Ala. 86.

⁷ *Anon. Lofft*, 328; *Nokes v. Milward*, 2 Add. 386; 2 Eng. Eccl. R. 356; *Gaines v. Relf*, 12 How. U. S. 472. In some of the States such certificates are made evidence by statute. 2 *Phil. Ev.* 4th ed. 252, note 324. See *Blackburn v. Crawfords*, 3 Wallace, U. S. Rep. 175.

⁸ *Beer v. Ward*, *supra*.

“A certificate of marriage, if proved to have been kept in the custody of a person whom it affects, may be read as collateral proof.” And both he and Lord Tenterden admitted such a certificate in that case. The ground upon which evidence of this character is admissible, would seem to be, that of a declaration of the marriage by the party preserving the certificate; who may be supposed thereby to adopt the assertion of the fact stated in the document. This adoption may be further shown by proof of the handwriting of the party in or upon it, or by circumstances showing the value ascribed to it by him.¹ Such certificate, also, or other document of the like character may be read as evidence confirmatory of the proof by reputation and cohabitation.²

12. Besides the presumption of the *fact* of marriage from circumstances, there is also a presumption from the fact, however proved, that the mode or form of it was such as to render the marriage valid. *Omnia presumunter ritè et solemniter acta*: parties marrying must be presumed to have done so in a manner conformable to law; and the presumption is founded in reason, for, when they have determined upon a fact of marriage, it is to their interest that the contract should be binding.³

13. And even if it be shown that a particular marriage was void, yet, if the parties continued to cohabit as husband and wife, a subsequent legal marriage may be presumed.⁴ A number of cases have arisen in the American courts to which this doctrine was applied. Thus, where a woman contracted a second marriage, supposing that her first husband, who had been long absent, was dead, and he afterwards returned and survived the second marriage for several years, but the parties thereto continued to cohabit as husband and wife, a resolemnization of their marriage, after the death of the first husband, was presumed.⁵ So where the husband had a former wife living at the time he entered into a second marriage, and the first wife subsequently left the country, and was not heard of afterwards, the court not only applied the rule raising a

¹ Hubb. Ev. Succes. 258; *Vowles v. Young*, 13 Ves. Jr. 145. See 2 Phil. Ev. 4th ed. 252, note 324; *Hill v. Hill*, 32 Pa. St. 511.

² *Doe v. Grazebrook*, 4 Ad. & El. N. S. 406; 2 Greenl. Ev. § 463. See, also, *Rex v. Bampton*, 10 East, 287.

³ *Steadman v. Powell*, 1 Add. 58; 2 Eng. Eccl. R. 26; Hubb. Ev. Succes. 262.

⁴ *Wilkinson v. Payne*, 4 T. R. 468; Hubb. Ev. Succes. 263; 1 Phil. Ev. 4th ed. 631.

⁵ *Fenton v. Reed*, 4 John. 52. But see *Cram v. Burnham*, 5 Greenl. 213; *Northfield v. Plymouth*, 20 Verm. 582.

presumption of death where a person has been absent unheard from for several years, but held, also, that the continued cohabitation of the parties, taken in connection with the reputation of their marriage and other circumstances proved in the case, justified the presumption that a new marriage contract had been entered into by them after the presumed death of the first wife.¹ So where a woman married a second time some five or six years after her first husband left the country, and after the lapse of about fifty years, during all which time the first husband remained absent, unheard from, applied for dower in the estate of the second husband, who was then deceased, her claim was allowed, the court holding that the fair presumption arising from the circumstances of the case, the lapse of time, and the rule that innocence is to be presumed, was, that the first husband was dead at the time of the second marriage.²

14. A marriage solemnized in conformity to law between competent parties is complete without cohabitation; and the subsequent refusal of the wife to live and cohabit with her husband does not affect her right to dower in his estate.³

Proof of the time of the marriage.

15. It sometimes becomes important, in actions for dower, to show at what time the marriage of the demandant took place, as her right is subject to all charges and liens upon the land created prior thereto.⁴ Where direct evidence to establish the marriage is given, no difficulty upon this point can well arise; but this class of evidence is not always accessible to the parties interested.

16. The conduct of the parties, and all other evidence available in proof of the fact of marriage, may also be useful in establishing the time. For the period of the first occurrence of facts indicative of a subsisting marriage, will supply an inference of the time when

¹ Jackson v. Claw, 18 John. 346. To the same effect: Donnelly v. Donnelly, 8 B. Mon. 113; Yates v. Houston, 3 Texas, 433; Woods v. Woods, 2 Bay, 476. See vol. i., ch. vii., §§ 10-12; ch. iv., § 18.

² Chapman v. Cooper, 5 Rich. L. 452; Spears v. Burton, 31 Missis. 547. Upon the subject of evidence to disprove an alleged marriage, or to overcome the presumption arising from circumstances proved, see 2 Greenl. Ev. § 464; 1 Phil. Ev. 4th ed. 589, note (1).

³ Potier v. Barclay, 15 Ala. 439; Clayton v. Wardell, 4 Comst. 230.

⁴ See vol. i., ch. xxviii.

the marriage state commenced. With this view, evidence was gone into in the Berkeley Peerage case, as to the time when the countess was first called Lady Berkeley by the servants, and when her linen was first marked with the initials M. B. and a coronet.¹

17. From the treatment of a child as legitimate by the parents, there arises a presumption, (of course open to rebuttal), not only that the parents were married, but also that their marriage was anterior to the child's birth. Where the legitimacy of a daughter was impeached on the ground of her birth before the marriage of her parents, and she proved their treatment and acknowledgment of her as legitimate, and that her father bequeathed the residue of his property to her by the description of his daughter, it was held that it lay with the other party to show her illegitimacy by proving the time of her birth, and of the marriage of her parents subsequent to it.²

18. The time of the marriage may also be proved by the declarations of the parties themselves under the restrictions to which hearsay evidence is subject.³ The declarations of parents that a child was born before or after wedlock, fall under this head, since they are declarations of the time of marriage relatively to the time of birth.⁴

*Proof of seizin by the husband.*⁵

19. It is well settled, that the demandant in dower is not required to make strict proof of her husband's title under the issue of *non seizin*. She is not, by law, the custodian of her husband's title papers, and therefore, in making out a *prima facie* case, the slightest or lowest order of evidence is all that is exacted at her hands.

20. Where the defendant is in possession under a conveyance from the husband, or by virtue of a title derived through mesne conveyances from him, proof of this fact is sufficient to establish, as against the defendant, the seizin of the husband.⁶

¹ Hubb. Ev. Succes. 260.

² Hubb. Ev. Succes. 260; Mayo v. Brown, 2 Lee, 391; 6 Eng. Eccl. R. 168.

³ Hiliard v. Phaly, 8 Mod. 180.

⁴ Stevens v. Moss, Cowp. 591; Rex v. Bramley, 6 T. R. 330; Hubb. Ev. Succes. 259.

⁵ Upon the subject of seizin generally, see vol. i., ch. xii.

⁶ Hitchcock v. Harrington, 6 John 290; Collins v. Torry, 7 John. 278; Hitchcock v. Carpenter, 9 John. 344; Bancroft v. White, 1 Caines, 185; Bowne v. Potter, 17

21. So, also, proof that the husband of the demandant was in possession during the coverture, claiming title; or that he was in receipt of rents from the person in possession, is *prima facie* sufficient evidence of seizin to warrant a recovery against one whose possession commenced subsequently thereto.¹ And unless impeached or explained, such possession is conclusive evidence of title.²

22. This doctrine has been stated in clear and satisfactory terms in a number of the decided cases. Thus, in *Jackson v. Waltermire*,³ Savage, Ch. J., said: "It is urged, and I think correctly, that the same evidence of seizin should entitle the widow to recover her dower, as would be sufficient to authorize a recovery by the heir. In such case, 'the seizin of the deceased is proved by showing his actual possession of the premises; or by proving his receipt of rent from the person in possession.'"⁴ The rule laid down by Kent, Justice, in *Bancroft v. White*,⁵ is this: "The former husband of the demandant, for some years previous to the

Wend. 164; *Sherwood v. Vandenburg*, 2 Hill, 303; *Sparrow v. Kingman*, 1 Comst. 242; *Davis v. Darrow*, 12 Wend. 65; *Finn v. Sleight*, 8 Barb. 401; *Kimball v. Kimball*, 2 Greenl. 226; *Nason v. Allen*, 6 Greenl. 243; *Hains v. Gardner*, 10 Maine, 383; *Hamblin v. Bank of Cumberland*, 19 Maine, 66; *Stimpson v. Thomaston Bank*, 28 Maine, 259; *Thorndike v. Spear*, 31 Me. 91; *Kidder v. Blaisdell*, 45 Maine, 461; *Moore v. Esty*, 5 N. H. 479; *Wedge v. Moore*, 6 Cush. 8; *English v. Wright, Coxe*, 437; *Montgomery v. Bruere*, 2 South. 865; *Hyatt v. Ackerson*, 2 Green (N. J.), 564; *Davis v. O'Ferrall*, 4 G. Greene (Iowa), 358; *Coakley v. Perry*, 3 Ohio St. 344; *Ward v. McIntosh*, 12 Ohio St. 231; *May v. Tillman*, 1 Mann. 262; *Dashiel v. Collier*, 4 J. J. Marsh. 601; *Wall v. Hill*, 7 Dana, 172; *Griffith v. Griffith*, 5 Harring. 5; *Bordley v. Clayton*, *Ibid.* 154; *Plantt v. Payne*, 2 Bailey, 319; *Gayle v. Price*, 5 Rich. L. 525; *Pledger v. Ellerbee*, 6 Rich. L. 266; *Douglass v. Dickson*, 11 Rich. L. 417; *Norwood v. Marrow*, 4 Dev. & Bat. L. 442; *Chapman v. Schroeder*, 10 Geo. 321; *Wooldridge v. Wilkins*, 3 How. Miss. 360. As to the application of the doctrine of *estoppel* where the tenant is in possession claiming under the husband, see next chapter.

¹ *Jackson v. Waltermire*, 5 Cow. 299; *Carpenter v. Weeks*, 2 Hill, 341; *Knight v. Mains*, 12 Maine, 41; *Cochrane v. Libby*, 18 Maine, 39; *Stevens v. Reed*, 37 N. H. 49; *Forrest v. Trammel*, 1 Bailey, 77; *Mann v. Edson*, 39 Maine, 25; *Barton v. Hinds*, 46 Maine, 121; *Gentry v. Woodson*, 10 Misso. 224; *Smith v. Paysinger*, 2 Mills (Con. Court), R. 59; *Reed v. Stevenson*, 3 Rich. L. 66; *Torrence v. Carbry*, 27 Misssis. 697; *Randolph v. Doss*, 3 How. Missis. 205; *Caruthers v. Wilson*, 1 S. & M. 527; *James v. Rowan*, 6 S. & M. 393; *Sheppard v. Wardell, Coxe*, 452; *Sparrow v. Kingman*, 1 Comst. 242.

² *Stevens v. Reed*, 37 N. H. 49; *Knight v. Mains*, 12 Maine, 41; *Forrest v. Trammel*, 1 Bailey, 77.

³ *Jackson v. Waltermire*, 5 Cow. 299.

⁴ 2 Phil. Ev. 187.

⁵ *Bancroft v. White*, 1 Caines, 190.

1st of November, 1786, was possessed of the premises, and used them as his own, and not in the right of another. He then for a valuable consideration, conveyed the same in fee with a covenant of warranty; and the lands have passed by subsequent conveyances in fee to the present tenant. This is sufficient evidence, in the first instance, of seizin in the husband. The wife is not bound to produce her husband's deeds, because it is not presumed to be in her power." In *Embree v. Ellis*,¹ Thompson, Justice, remarked: "The principal question in this case is, whether a sufficient seizin in the demandant's husband has been shown to entitle her to dower. Lewis Morris, the son, had been possessed of the premises in question, by receiving the rents and profits for ten years. He then conveyed them in fee to the demandant's husband, who continued in possession for ten or twelve years, until they were sold under an execution against him, and purchased by Lewis Morris, the son. These facts were clearly sufficient, *prima facie*, to entitle the demandant to a recovery." In *Smith v. Paysinger*,² it is said: "A widow who claims dower is not obliged to show the deeds by which the seizin of the husband is manifested, as she is not entitled to have the title deeds." And in subsequent cases in the same court it is further remarked: "A demandant in dower need not make out a regular chain of title in her husband, but it is sufficient for her to show that he had been in possession during the coverture; and it is then incumbent on the defendant to show a paramount title in himself."³ The rule is stated in similar terms in a New Jersey case: "The widow is not entitled to the custody of the muniments of title. They belong to, and are therefore presumed to be held by the husband in his lifetime, and by his heir after his decease; or, in the case of alienation, by the alienee. Hence, a strict deduction of title is not required of her. It is enough for her to produce such evidence as will raise a fair presumption of the seizin of the husband; and such presumption, unless overcome by the proof produced by the defendant, will support her claim."⁴ In a discussion of this subject in a Missouri case, these observations occur: "Possession, under a claim of title, has usually been the character of the proof in such cases, and such proof has been held sufficient."⁵ And in a case in Maine, the court said: "The case

¹ *Embree v. Ellis*, 2 John. 123.

² *Smith v. Paysinger*, 2 Mills, Con. Court, 59.

³ *Forrest v. Trammel*, 1 Bailey, 77; *Reid v. Stevenson*, 3 Rich. L. 66.

⁴ *Griggs v. Smith*, 7 Halst. 22.

⁵ *Gentry v. Woodson*, 10 Misso. 224.

finds the husband to have been in possession of the land wherein the demandant claims dower. Certain of his creditors levied upon it as an estate in fee; and such an estate is now claimed by the tenant, under a title depending upon these levies. In the absence of any conflicting proof, we regard this, as against the tenant, evidence of a seizin in fee of the husband."¹

23. As a widow is not entitled to the custody of her husband's title papers, she may, in New Hampshire, after proof of her marriage, and of her husband's possession and death, use an office copy of a deed held by him in his lifetime, without proof of the loss of the original.² So in Maine, office copies of deeds are admissible to establish the title and seizin of the husband.³

24. In Massachusetts and Maine, in the absence of countervailing evidence, a deed conveying real estate, does, of itself, raise the presumption that the grantor had sufficient seizin to enable him to convey, and also operates to vest the legal seizin in the grantee.⁴ And proof of the conveyance of the premises wherein dower is claimed, to the husband, by deed of warranty, and of his conveying the same to another person during the coverture, is sufficient to prove the seizin of the husband.⁵ But this is only *primâ facie* evidence and liable to be disproved.⁶ In Pennsylvania, the demandant need go no further back in showing the title, than a conveyance in fee from the defendant to her deceased husband.⁷ And in New Jersey, a deed from a person having the previous possession, purporting to convey the premises in fee simple to the husband, and a possession by the husband for three years under such deed, are regarded as *primâ facie* evidence of the seizin, and will entitle the demandant to recover, unless repelled by the proofs of the tenant.⁸

25. Where a conveyance is executed by two or more persons as vendors of the land described therein, it is a presumption of the law, in the absence of explanatory evidence, that they were joint tenants or tenants in common; and the widow of one of them will be restricted in her dower accordingly. Thus, where it appeared

¹ *Cochrane v. Libby*, 18 Maine, 39.

² *Stevens v. Reed*, 37 N. H. 49.

³ *Kidder v. Blaisdell*, 45 Maine, 461. But see *Potier v. Barclay*, 15 Ala. 439.

⁴ *Ward v. Fuller*, 15 Pick. 185; *Bolster v. Cushman*, 34 Maine, 428. See post, § 28.

⁵ *Carter v. Parker*, 28 Maine, 509.

⁶ *Ward v. Fuller*, 15 Pick. 185.

⁷ *Evans v. Evans*, 29 Pa. St. 277.

⁸ *Griggs v. Smith*, 7 Halst. 22.

that the deceased husband lived on the premises in which dower was demanded for many years, claiming them as his own; but that upon a sale two other persons united with him in making the deed, dower was allowed in one-third part only of the tract.¹ So where two persons joined in erecting two houses in a block, and then divided them by parol, and each occupied the portion set apart to him, and afterwards sold the same and received the purchase money, this was held not sufficient to establish such a sole seizin as to enable the widow of one of the parties to recover dower in the entire premises assigned to him, and her claim was limited to dower in a moiety.² But where A. and B. purchased a piece of land and divided it between them; and A., being in the exclusive occupation of his part, sold it to D., but both A. and B. joined in the conveyance, it was held, that although the deed from A. and B. might be *prima facie* evidence that they were tenants in common of the part conveyed, yet that the occupation of the land by A., and the purchase of it by the defendant of him exclusively, were evidence of A.'s seizin of the whole, so as to entitle his widow to dower out of the whole of his part of the land originally purchased by A. and B., and not merely in a moiety of that part.³ "This deed might be *prima facie* evidence," the court said, "that Charles and Jonathan held as tenants in common; but the proof is abundant to show that such was not the fact, but that Jonathan had held and enjoyed the whole in his own right, and Charles must have been joined in the deed for greater caution. The manner in which Jonathan used and occupied the land, and the defendant's purchasing it of him exclusively, are sufficient, within the decisions of this court, to establish a seizin in Jonathan."⁴

26. Where a conveyance was made to two persons jointly, brother and sister, and the sister entered into possession, and after the death of the brother his widow applied for dower in his moiety of the land, it was held, that in the absence of proof of an ouster, or that the possession of the sister was adverse, the widow, as against the representatives of the husband, was entitled to dower.⁵

¹ Dashiell v. Collier, 4 J. J. Marsh. 601.

² Hamblin v. Bk. of Cumberland, 19 Maine, 66. In this State equitable interests are not subject to dower. See vol. i., ch. xx., § 4.

³ Dolf v. Basset, 15 John. 21.

⁴ See Stimpson v. Thomaston Bk., 28 Maine, 259; Wedge v. Moore, 6 Cush. 8.

⁵ James v. Rowan, 6 S. & M. 393.

27. The widow may give parol evidence to prove that the land granted to her husband, is the same land of which dower is demanded. Thus, where dower was claimed in a tract of land called *Wertimburgh*, and the demandant, to prove her husband's seizin, gave in evidence a patent of a tract called *Wertinburgh*, she was allowed to introduce testimony to show an entry by her husband, and that the land called Wertinburgh in the patent and Wertimburgh in the declaration, was the same.¹

28. Notwithstanding the indulgence extended to the widow, she must, nevertheless, establish a seizin by her husband, actual or constructive, during the coverture, or fail in her action.² A deed from persons professing to be proprietors of a large tract of land, to trustees, for the purpose of laying out a town, and a subsequent deed of partition among these proprietors, will not establish a seizin in them, unless their title be shown, or a possession of some sort established, so as to create presumptive evidence of title; and in the absence of such evidence a case is not made entitling the widow of one of them to recover dower.³

29. Where a tenant holding adversely, conveys the premises to the holder of the regular paper title before the expiration of the period necessary to raise the legal presumption of a grant, he thereby does away with his adverse possession as evidence of seizin, and his wife's initiate title to dower falls with it, so that she can not recover dower after her husband's death.⁴

30. The demandant can not, in general, for the purpose of showing her right to dower, avail herself of recitals contained in the deed by which the defendant holds the premises, or contained in the deed to his grantor, recognizing her right of dower, unless she is a party or privy to the deed. But in case of loss of the *primary* evidence to establish her right, such recitals may be resorted to as secondary evidence.⁵

31. In Maine, it is held that the declarations of the husband as

¹ Keefer v. Young, 2 H. & J. 53.

² Ware v. Washington, 6 S. & M. 737; Dennis v. Dennis, 7 Blackf. 572; Gentry v. Woodson, 10 Misso. 224.

³ Gentry v. Woodson, 10 Misso. 224. There seems to be a manifest difference between a case of this kind, where the deed is to *trustees*, and assumes to pass no beneficial interest, and the cases noticed, ante, § 24, where the conveyance purports to pass both the legal and beneficial interest.

⁴ Poor v. Horton, 15 Barb. 485.

⁵ Jewell v. Harrington, 19 Wend. 471.

to his *equitable title*, are immaterial and inadmissible in evidence.¹ But his declarations are admissible to show the extent of his *possession*.² In Ohio, declarations of the husband made at the time of his purchase, as to his interest in the lands, may be given in evidence; but declarations, by deed or otherwise, made subsequently, are not admissible either for or against the widow.³

32. On a proceeding for dower, the heir produced a deed from the husband, dated thirteen years before his intermarriage with the demandant, and by a subscribing witness proved a delivery of the deed a short time before the husband's death, and his declaration that the deed had been delivered many years before. It was held, that this declaration was no part of the *res gestæ*, so far as it related to the alleged previous delivery, and therefore no evidence of such previous delivery as against the demandant.⁴

33. In New York, in ejectment for dower admeasured on application to the surrogate under the statute of that State, the proceedings before him are no evidence of title, but merely of the location of the land to be recovered. All the other facts, as seizin of the husband, &c., must be proved in the ordinary way as in an action of dower.⁵

34. Where the estate of which dower is demanded has come to the husband by descent, it will be sufficient to entitle the widow to recover, to prove the seizin of the ancestor, his death, and the heirship of the husband.⁶

*Proof of the husband's death.*⁷

35. If the defendant deny that the husband of the demandant is dead,⁸ it devolves upon her to make proof; and this leads to the inquiry as to the nature and amount of the evidence required by

¹ Mann v. Edson, 39 Maine, 25.

² Forrest v. Trammel, 1 Bailey, 77.

³ Derush v. Brown, 8 Ohio, 412.

⁴ Pinner v. Pinner, Busbee, Law, 475.

⁵ Matter of Watkins, 9 John. 245; Jackson v. Hixon, 17 John. 123; Jackson v. Randall, 5 Cow. 168; Jackson v. Waltermire, Ibid. 299; Jackson v. Dewitt, 6 Cow. 316; Parks v. Hardey, 4 Bradf. 15; Wood v. Seely, 32 N. Y. 105.

⁶ Park, Dow. 320, note. See vol. i., ch. xii., §§ 24-26.

⁷ See vol. i., ch. xxxi.

⁸ The plea *ne unques seised* admits the death of the husband. Sheppard v. Wardell, Coxe, 452. And where the defendant claims under the heir of the husband, he is estopped from denying the death of the latter. Hitchcock v. Carpenter, 9 John. 344.

the ordinary rules of law, in cases where it becomes material to establish the fact of death.

36. The general rule is, that the existence of a person being once shown, he is presumed to continue in life, and the *onus* rests upon the party asserting his death.¹ This presumption seems to be merely the application to this case of the common rule of evidence, that the last proved state of things shall be considered as subsisting at the time of the inquiry. Out of such a rule it seems reasonable to except cases where the state of things must from their nature, after the lapse of a certain period, suffer a specific change; and although, in the duration of human life, no term can be fixed as an *ultimum tempus*, the extreme infrequency of the prolongation of life beyond a century, led to the adoption of that period in the civil law as one at which the presumption of life was not in force.² Civilians accordingly hold, that there is no presumption of life in the case of persons, who, if living, would be above a hundred years old.³ And in Scotland, probably on the same authority, it has been decided, that the death of a man might be presumed after the lapse of an hundred years from the date of an instrument in which he was named.⁴

37. There are some traces of the recognition in the common law of even a shorter term than a hundred years, as sufficient of itself to repel the presumption of life. Lord Hale said, that if a feoffment be made to the use of A. for ninety-nine years if he shall so long live, and after his death to the use of B. in fee, this shall not be contingent, for it shall be presumed his life will not exceed ninety-nine years; but that it had been otherwise if it had been made but for twenty-one years.⁵ In two other cases the possibility of the particular tenant living longer than the term of eighty years was disregarded in determining the nature of the remainders.⁶ But

¹ Throgmorton v. Walton, 2 Roll. Rep. 461; Wilson v. Hodges, 2 East, 312; Battin v. Bigelow, 1 Pet. C. C. R. 452; Stevens v. McNamara, 36 Maine, 176; Miller v. Beates, 3 S. & R. 490, 493; Smith v. Knowlton, 11 N. H. 191; Emerson v. White, 9 Fost. (N. H.) 482; 1 Greenl. Ev. § 41.

² Cod. lib. 1, t. 2, c. 23. And see 10 Rep. 50.

³ Hubb. Ev. Succes. 168.

⁴ Ibid.; Morison, Presumption, xvi.

⁵ Weale v. Lower, Pollexf. 67. Lord Coke had previously gone to the extent of saying that it was "*a common intendment that a man should die within five thousand years.*" 10 Rep. 50.

⁶ Napper v. Sanders, Hutt. 118; Lord Derby's case, Litt. Rep. 370.

where the term was only sixty years, the court took into consideration the possibility of the duration of the life exceeding the term.¹ So upon the trial, in 1732, of an issue directed by the court of exchequer, the deposition of a witness examined in 1672, was offered to be read without any evidence of his being dead; but Reynolds, C. B., refused to admit it; saying, however, that if proper searches or inquiry had been made, and no account could be given of the party, he would have admitted it at such a distance of time.² The lapse of fifty years has been held insufficient to warrant the presumption that a collector of tithes was dead;³ but the book of such a person, written in 1679, was admitted in evidence in 1753, because it was not reasonable to suppose that he was then alive.⁴ And it was held, in an ejectment tried in 1828, that the death of four persons mentioned in a settlement dated in 1689, whose title would supersede that of the lessor of the plaintiff claiming as heir, might be presumed from the lapse of time.⁵

38. The most positive evidence of death, is the testimony of those who can prove that they were present when it occurred, or that, having been acquainted with the person of the deceased when alive, they have seen his body after life was extinct. The medical attendants of the deceased in his last illness, who may be presumed to be best able to discriminate between real and merely apparent death, are the most competent, and accordingly most usual witnesses. This mode of proof has often the advantage over an extract from the register, of establishing at the same time the identity of the deceased.⁶

39. The fact of death may also be established by documentary evidence. Where parish or other registers are required by law to be kept, entries therein of the death or burial of the deceased, are, for all ordinary judicial purposes, evidence of the fact stated.⁷ It has been held in the Supreme Court of the United States, that entries in the register of burials of Christ Church, St. Peter's and

¹ *Beverley v. Beverley*, 2 Vern. 131. And see *Fearne*, Con. Rem. § 4.

² *Benson v. Olive*, 2 Strange, 920. See *Godb.* 326.

³ *Manby v. Curtis*, 1 Price, 225.

⁴ *Jones v. Waller*, *Ibid.* 229; 3 Gwill. 847.

⁵ Per *Vaughan*, B., *Doe dem. Oldnall v. Deakin*, 3 Carr. & Payne, 402; 14 Eng. C. L. R. 369; *Hubb. Ev. Succes.* 168, 169.

⁶ *Hubb. Ev. Succes.* 160.

⁷ *Bull. N. P.* 247; *Hubb. Ev. Succes.* 160; 2 *Greenl. Ev.* § 278 *d.*

St. James's, in Philadelphia, are evidence to prove the period of the decease of the persons named therein.¹ So an entry by a deceased father in a family Bible is admissible to establish the death of his son, and the time when it occurred.² Proof of death may also be made by the registers at the navy office containing the muster-rolls of vessels in the public service;³ and by the pay lists of the company in which the deceased served as a subaltern.⁴ Inquisitions *post mortem* taken before escheators or coroners would appear to be admissible evidence of the fact of death, but they are not conclusive, since they may be traversed in the proper court.⁵ But the certificate of an officer having charge of a state prison is not admissible as evidence of the time of the decease of a prisoner under his charge, unless it is made his legal duty to register the death.⁶ Nor is the certificate of a consul of the death of an individual abroad sufficient proof of that fact.⁷

40. It seems that in the English temporal courts, neither letters of administration nor probate of a will are even *primâ facie* evidence of death,⁸ though a contrary rule appears to have prevailed in the ecclesiastical courts.⁹ The ground upon which the temporal courts proceed in this particular is, that the death is not the matter directly determined by the ecclesiastical court in granting the letters or in probating the will, but is only inferrible by argument therefrom; and that this inferential deduction can not be received as evidence of the fact in other courts.¹⁰ In one case, indeed, Lord Hardwicke admitted the probate of a will as evidence of the testator's death; relying upon the lapse of time from the grant of the probate, and the difficulty of obtaining better evidence, the death having occurred in the East Indies.¹¹ In another case, which was

¹ *Lewis v. Marshall*, 5 Pet. 470.

² *Ibid.*

³ *Hubb. Ev. Succes.* 161; 2 *Greenl. Ev.* § 278 *d.*

⁴ *Ibid.* See *Jackson v. Etz*, 5 Cow. 314.

⁵ *Ibid.*; *Sergeson v. Sealey*, 2 Atk. 412; 1 *Saund.* 362, note (1).

⁶ *Gill v. Phillips*, 6 Mart. Lou. Rep. N. S. 298, 300, 301.

⁷ *Morton v. Barrett*, 19 Maine, 109.

⁸ *Hubb. Ev. Succes.* 160. Per Lord Gifford, *Moons v. De Bernales*, 1 Russ. 307; *Thompson v. Donaldson*, 3 Esp. 63. See 2 Esp. 564.

⁹ See *Swinburne on Wills*, part 6, § 13; *Williams on Executors*, 1267.

¹⁰ 1 *Salk.* 290; *Hubb. Ev. Succes.* 161, 162. But see 1 *Greenl. Ev.* § 550, and note.

¹¹ *French v. French*, 1 Dick. 268.

a criminal prosecution, the death had likewise taken place in India, and the letters of administration were admitted as evidence of it without question, the identity being established.¹ In the office of the accountant-general of the court of chancery, the probate was always received as evidence of the testator's death; but Lord Eldon disapproved the practice.² And it is said that in the master's office, and in applications to the court itself, the death must be verified by an examined copy of the register, accompanied by evidence of identity.³

41. But in the American courts, the tendency is to regard both a grant of letters of administration and the probate of a will as *prima facie* evidence of death; and Professor Greenleaf so states the rule.⁴ In a case in Massachusetts the point was directly presented and determined. "The fact of the death does not stand on a presumption," the court said, "but on an adjudication of the probate court. That court could not grant administration without being satisfied that Chandler was dead, and so long as the letters of administration stand unrecalled, they are evidence of the death."⁵

42. Documentary evidence of the death should be accompanied by some proof of the identity of the party whose decease is to be established with the person named in the writing.⁶ Upon this point the rule is succinctly stated by Professor Greenleaf as follows: "The identity of the person is, *prima facie*, inferred from the identity of the name; except where the place of residence was in a large city or town; in which case proof of some additional circumstances seems to be necessary."⁷ In weighing the sufficiency of evidence of identity, the comparative frequency of the name is also a material circumstance to be considered.⁸

43. Family reputation, and the declarations of deceased rela-

¹ Fourth Report Real Property Commission, App. p. 98.

² Clayton v. Gresham, 10 Ves. Jr. 288.

³ Hubb. Ev. Succes. 162. There have been several instances of grants of administration and probate of the wills of persons upon an erroneous supposition of their death; and the facility with which grants of administration issue has led to their being sometimes fraudulently employed as evidence of death. See a reference to some of these cases in the work here cited, pp. 164, 165.

⁴ 1 Greenl. Ev. §§ 41, 550; 2 Ibid. § 278 d., 355.

⁵ Newman v. Jenkins, 10 Pick. 515. See, also, Succession of Hamblin, 3 Rob. Lou. R. 130; Muirhead v. Muirhead, 27 Missis. 97.

⁶ Bull. N. P. 247; Hubb. Ev. Succes. 160.

⁷ 2 Greenl. Ev. § 278 d.

⁸ Hubb. Ev. Succes. 464.

tives, made when they had no interest to misrepresent the truth, are also admissible to prove the fact of death.¹ "Hearsay is good evidence to prove my father, mother, cousin, or other relative beyond the sea, dead; and the common reputation and belief of it in the family gives credit to such evidence."² Reputation in the family of the death of the husband is *primâ facie* evidence of the fact in an action for dower.³ And it has been decided, that where a person lived out of the State, reputation among his acquaintances in the place where he last resided is also admissible to prove his death.⁴ In a case in the supreme court of the United States, it was held competent for a witness to testify as to information received of the death of a person while the witness was temporarily at the former place of residence of the deceased.⁵ But in Kentucky, proof of the mere statement of an individual in another State, where the person supposed to be dead had resided, was held insufficient to establish the alleged death.⁶ "The sayings of relatives of the deceased," the court remarked, "and perhaps of the neighbors and intimate acquaintances, have been admitted to prove death, especially those made when there is no pending controversy, and when the mind of the speaker is so evenly balanced, as to be supposed to have no motive for telling falsehood. But this is far from being the case here. For anything that appears, it is the saying of a solitary stranger, admitted as sufficient to prove death, on which the title of the parties essentially depends." So, a mere rumor or report will not be received as evidence of the death of a person abroad, when the deceased has relatives in this country whose testimony might be procured.⁷ But the fact that an individual was missing at a particular time, accompanied by a report

¹ Hubb. Ev. Succes. 165; 2 Greenl. Ev. § 278 g.; 1 Phil. Ev. 4th ed. 250, 263, note 98; Raborg v. Hammond, 2 Har. & Gill, 42, 52; Pancoast's Lessee v. Addison, 1 Har. & J. 350, 356, 357; Cochrane v. Libby, 18 Maine, 39; Waldron v. Tuttle, 4 N. H. 378; Emerson v. White, 9 Foster (N. H.), 482; Ewing's Heirs v. Savary, 3 Bibb, 235; Dudley v. Grayson, 6 Mon. 259. But see Whittuck v. Waters, 4 Carr. & Payne, 375; 19 Eng. C. L. 427, which is said in the notes to Phillipp's on Evidence, not to have been fully considered. 1 Phil. Ev. 4th ed. 264, note. See, also, Newham v. Raithby, 1 Phill 315.

² Bull. N. P. 294, citing Grimwade v. Stephens, Kent, 1697; Doe dem. Banning v. Griffin, 15 East, 293; Doe v. Williams, Cowp. 621.

³ Cochrane v. Libby, 18 Maine, 39. See, also, Kidder v. Blaisdell, 45 Maine, 461.

⁴ Ewing's Heirs v. Savary, 3 Bibb, 235; Dudley v. Grayson, 6 Mon. 259.

⁵ Lessee of Scott v. Ratliffe, 5 Pet. 81. See Jackson v. Cody, 9 Cow. 140.

⁶ Dudley v. Grayson, 6 Mon. 259.

⁷ Nicholas v. Lansdale, Litt. Sel. Cas. 21.

and general belief of his death is *prima facie* sufficient.¹ The rule, however, does not admit hearsay evidence of finding the body and burial of one supposed to be dead.²

44. Reputation in a family of the death of any of its members may be made evident, as well by conduct which points with sufficient significancy to the fact in question, as by express declarations. Thus, it may be proved that a funeral was attended by members of the family as that of the person whose death is alleged; that they went into mourning for him, dealt with his property, or otherwise acted upon the supposition that he was dead.³

45. So the silence or inaction, under certain circumstances, of the party who is alleged to be dead, may assist the inference of his death. In an important English case, part of the evidence of the death of certain individuals was the testimony of a solicitor that they had ceased to receive life annuities which he used to pay them under the will of one of their relatives.⁴

46. In order to let in evidence of reputation or declarations of deceased relatives, a necessity to resort to it ought first to be shown. This may be done by proving an ineffectual search for an entry of the burial of the party in the proper register, if there be reason to suppose he was buried in a locality where such a register was kept; or by proof of his protracted absence abroad; or by other circumstances which tend to negative the possibility of obtaining better evidence. In imposing this restriction upon the admission of reputation as evidence of death, the common law agrees with the civil law.⁵

47. The fact of death may also be proved by *presumptive* as well as by direct evidence.⁶ When a person goes abroad and has not been heard of for a long time, the presumption of the continuance of life ceases at the expiration of seven years from the period when he was last heard of.⁷ And the same rule holds generally with respect to

¹ Jackson v. Etz, 5 Cow. 314; Jackson v. Boneham, 15 John. 226.

² Jackson v. Etz, 5 Cow. 314.

³ Hubb. Ev. Succes. 166.

⁴ Hubb. Ev. Succes. 167.

⁵ Ibid. 166.

⁶ Thorne v. Rolfe, Anders. 20, pl. 42; Dyer, 185 a.; Bendl. 86; Webster v. Birchmore, 13 Ves. Jr. 362.

⁷ Hopewell v. De Pinna, 2 Camp. 113; Doe dem. Banning v. Griffin, 15 East, 293; Doe dem. Knight v. Nepean, 5 Barn. & Adol. 86; 27 Eng. C. L. 42; Lee v. Willock, 6 Ves. Jr. 606; Rust v. Baker, 8 Sim. 443; Dixon v. Dixon, 3 Bro. C. C. 510; Newman v. Jenkins, 10 Pick. 515; Miller v. Beates, 3 S. & R. 490; Loring v. Steineman, 1 Met. 204; Smith v. Knowlton, 11 N. H. 191; Forsaith v. Clark, 1 Foster (N. H.),

persons away from their usual places of resort, and of whom no account can be given.¹ This period has been adopted as the ground of such presumption in analogy to the statute of 1 Jac. I., c. 11, relating to bigamy, and to the statute of 19 Car. II., c. 6, relating to the continuance of lives on which leases are held.²

48. By both of the statutes above cited, there must concur, in order to raise this presumption, absence for seven years and the non-receipt of intelligence concerning the party for the whole of that period.³ If the presumption proceeded upon lapse of time only, the prescribed term would be too short, for, being of general application, it ought to be at least a period, after the lapse of which, on the average of cases, death becomes more probable than life. The unknown past, with reference to the probabilities of events, may be judged of as the future; and the calculations of annuity tables show that the mean probable duration of human life, from the average of all ages, is much longer than seven years.⁴

49. And the absence must be with reference to some particular

409; *Stevens v. McNamara*, 36 Maine, 176; *Whiteside's Appeal*, 23 Pa. St. 114; *Osborn v. Allen*, 2 Dutch. 388; *Spurr v. Trimble*, 1 A. K. Marsh. 278; *Eagle v. Emmet*, 4 Bradf. 117; *Puckett v. State*, 1 Sneed, 355; *Rice v. Lumley*, 10 Ohio St. 596; *Merritt v. Thompson*, 1 Hilton, N. Y. C. P. 55; *Primm v. Stewart*, 7 Texas, 178; *Wambaugh v. Schanck*, 1 Penningt. 229; *Woods v. Woods*, 2 Bay, 476; *Spencer v. Roper*, 13 Ired. 333; *McCartee v. Camel*, 1 Barb. Ch. 455; *State v. Moore*, 11 Ired. 160; *Gilleland v. Martin*, 3 McLean, 490; *Innis v. Campbell*, 1 Rawle, 373.

¹ *Doe dem. Lloyd v. Deakin*, 4 B. & A. 433; 6 Eng. C. L. R. 476; *Doe dem. George v. Jesson*, 6 East, 85; *Rowe v. Hasland*, 1 W. Bl. 404; *Bailey v. Hammond*, 7 Ves. Jr. 590; *Stevens v. McNamara*, 36 Maine, 176; *Whiteside's Appeal*, 23 Pa. St. 114; *Rice v. Lumley*, 10 Ohio St. 596. See *Osborn v. Allen*, 2 Dutch. 388. But in *Spurr v. Trimble*, 1 A. K. Marsh. 278, it was held, that to justify the presumption of death from seven years absence, that absence must be from the State of the absentee's residence. See, also, *Hull v. Commonwealth*, Hardin, 479.

² *Doe dem. Knight v. Nepean*, 5 Barn. & Adol. 86; 27 Eng. C. L. 42; *Best, Presump.* § 140; *Hubback, Ev. Succes.* 170; 1 *Phillipps, Ev.* 4th ed., 640.

³ See *Miller v. Beates*, 3 S. & R. 490; *Newman v. Jenkins*, 10 Pick. 515; *Smothers v. Mudd*, 9 B. Mon. 490; *Loring v. Steineman*, 1 Met. 204. But where a second marriage has been solemnized within seven years after an absent husband or wife was last heard of, the courts will presume, in favor of innocence, after the lapse of that time, that the former husband or wife died before the second marriage was contracted. *Rex v. Twining*, 2 B. & Ald. 386; *Spears v. Burton*, 31 Missis. 547; *Chapman v. Cooper*, 5 Rich. L. 452. See ante, § 13. As to cases in which this presumption will not be made, see *Rex v. Harborne*, 2 Ad. & Ellis, 540; 29 Eng. C. L. 161.

⁴ *Hubback, Ev. Succes.* 171. See *In re Hall*, 1 Wallace, Jr. 85.

place, and the non-receipt of intelligence must be with reference to some person or persons. The previous home of the party affords data for the former fact; and proof of the latter, though most satisfactory when proceeding from members of the family, may be furnished by any one who would probably have heard of the absentee if living.¹ Letters from the absent person, written within seven years, are of course admissible to show that he was alive within that period.² But mere hearsay statements that he had been seen by others within that time are not competent evidence.³

50. The rule by which death may be inferred from seven years absence without tidings, does not prevent the same inference from being drawn from circumstances strong enough to warrant it which have occurred within a shorter period.⁴ Accordingly, where a person had embarked on board a vessel, which had not been heard of for two or three years, and which it was proved had encountered, soon after sailing, strong gales and tempestuous weather, it was held, that from these circumstances his death might be presumed.⁵ And where a vessel homeward bound from a distant port had not been heard of for six years, the court of chancery granted a reference to the master, to inquire and state whether a person who was the mate of the vessel was living or dead, and, if dead, when he died.⁶

51. The formation of the presumption may also be accelerated by proof of the age,⁷ state of health,⁸ occupation and mode of life of the party when last heard of; circumstances of obvious importance

¹ *Doe dem. Lloyd v. Deakin*, 4 B. & Ald. 433; 6 Eng. C. L. 476. See *McCartee v. Camel*, 1 Barb. Ch. R. 455; *Doe v. Andrews*, 15 Ad. & Ellis, N. S. 756.

² *Hopewell v. De Pinna*, 2 Camp. 113; *Rex v. Harborne*, 2 Ad. & Ellis, 540; 29 Eng. C. L. 161; *Dowl. P. C.* 636.

³ *Smothers v. Mudd*, 9 B. Mon. 490.

⁴ *Rowe v. Hasland*, 1 W. Bl. 404; *King v. Paddock*, 18 John. 141; *Smith v. Knowlton*, 11 N. H. 191; *Puckett v. State*, 1 Sneed, 355; *Eagle v. Emmet*, 4 Bradf. 117; 1 Greenl. Ev. § 41.

⁵ Per Lord Ellenborough, C. J., in *Watson v. King*, 1 Stark. N. P. C. 121; 2 Eng. C. L. 322; s. c. 4 Camp. 272. See, also, *Patterson v. Black*, Park on Ins. 2d Amer. ed. 433, 434; *Johnson v. Hamilton*, 1 Tyrw. & G. 45, 574.

⁶ *Egerton v. Egerton*, MSS. (1836), cited Hubb. Ev. Succes. 173; 1 Greenl. Ev. § 41; 2 Ibid. § 278 f. See, also, *Loring v. Steineman*, 1 Met. 204, 211; *White v. Mann*, 13 Shepl. 367; *King v. Paddock*, 18 John. 141; *In re Hutton*, 1 Curt. Eccl. R. 595; *Sillick v. Booth*, 1 Y. & Col. N. C. 117; *Dixon v. Dixon*, 3 Bro. C. C. 510; *Norris v. Norris*, Rep. temp. Finch, 419.

⁷ Per Lord Denman, 4 Nev. & Mann. 344.

⁸ *Webster v. Birchmore*, 13 Ves. Jr. 362; *Swinburne on Wills*, part 6, § 13.

in questions of this kind. "It appears to me," said Lord Denman, "that nothing could be more absurd than that there should be a presumption of life or death, without reference to the age, circumstances, situation of life, and common habits of the party. Can there be the same presumption as to a party who is one hundred and one who is thirty-five? as to a party who was in good health when last heard of, and one who was proved to have had a disorder upon him, which was likely speedily to terminate in his death?"¹ And the circumstance of the country whither the party had gone having been visited with a fatal disease, war, or other similar calamity; or again, the sudden unexplained cessation of his habitual correspondence with several persons, would materially assist the presumption of his death. On the other hand, the cause of the absentee's departure, the terms of intercourse on which he had lived with his relatives, or the state of communication between this and the country where he resided, may be such as to make the want of intelligence concerning him easily consist with the supposition of his continued existence.²

52. In the application of the rules for presuming death, regard is to be had to the subject of the claim, and the nature of the proceeding in which the question arises. Where the proceeding relates to the possession of real estate and not to the inheritance, an ill-founded presumption of death can rarely produce a worse effect than that of giving for a time the enjoyment of the land to a party not entitled to it; the *corpus* of the property in the meanwhile remaining entire, and the possession being recoverable by the party to whom it of right belongs.³

53. These considerations apply with peculiar force to a proceeding for the recovery and assignment of dower. The law imposes upon the husband the duty to make provision for the support and maintenance of his wife while he is living, and confers upon her a right to the enjoyment of a portion of his estate for the same purpose after his death. If, then, the presumption of death arising from unexplained absence, or from circumstances, be

¹ 4 Nev. & Mann. 344.

² Hubback, Ev. Succes. 173, 174; 2 Greenl. Ev. § 278 *f.* See *In re Hall*, 1 Wallace, Jr. 85.

³ Hubback, Ev. Succes. 176; *Rowe v. Hasland*, 1 W. Bl. 404; 2 Greenl. Ev. § 278 *h.* See *Lomax v. Ryder*, 7 Bro. P. C. 145; 4 Barn. & Ald. 434; 6 Eng. C. L. 477; *Miller v. Beates*, 3 S. & R. 490, 492.

sufficient to support a possessory action by the heir, or by a stranger, it is manifest that it should also entitle the wife to the enjoyment of her dower. The assignment could work the husband no injury should he return; for in that event the proceeding would go for nothing;¹ and in the meantime the wife would have derived her support from the source whence by law she was entitled to demand it. This reasoning might not apply with the same force where the husband had aliened the lands and dower was demanded of the grantee; but no good reason is perceived for exempting him from the operation of a rule of evidence sanctioned by long usage and well established in the law.

54. By the old law, where it could not be made to appear positively that the husband was dead, as where he was absent beyond seas, and no intelligence of him could be obtained, the wife might recover dower conditionally, upon entering into sureties to restore it without suit in the event of her husband's return.²

55. In *Thorne v. Rolfe*,³ in the 2d of Elizabeth, the court raised the presumption of death upon the lapse of the precise period since prescribed in certain cases by statute,⁴ and adopted in most others by the courts, accompanied by the negative evidence which is now required. In dower, issue was taken upon the question of the death of the husband. The demandant produced two witnesses, one of whom was the brother of the husband. Their testimony, according to the reporter, did not amount to full proof, but consisted in conjectures and presumptions, "because the husband departed the kingdom in the first year of Queen Mary, on account of his religion, and was a minister, and for these seven years has been absent; and in this time of this religion restored here, he is not come back; nor can any merchant of that country, *sc.* of Germany, or Englishmen who travel in those parts, tell of his being alive; nor is there any token of it; wherefore they conclude in their consciences that they rather think him dead than alive." And no opposing testimony

¹ It has been said *arguendo* in the old books, however, that after the court has given judgment upon the proofs, the matter shall never be brought into question again upon better proofs; for this would be to attain the court and impeach its credit. Hard. 127.

² Hughes, Writs, 159; Bract. 302, pl. 2; Woman's Lawyer, 274; Park, Dow. 247; Hubb. Ev. Succes. 175; 1 Bright, H. & W. 325, pl. 26.

³ *Thorne v. Rolfe*, 2 Dyer, 185 a.; s. c. 1 And. 20; Moor, 14, 15; Bendl. 89.

⁴ Ante, § 47.

being furnished by the tenant, judgment was given upon this evidence for the demandant.¹

56. The applicability of this rule of presumptive evidence to a proceeding for dower, was expressly recognized in a case recently determined in Ohio.² And in other cases the courts have manifested a disposition not to exact from the wife strict proof of her husband's death.³

¹ Park, Dow. 247; Hubb. Ev. Succes. 176. ² Rice v. Lumley, 10 Ohio St. 596.

³ Cochrane v. Libby, 18 Maine, 39; Kidder v. Blaisdell, 45 Maine, 461. See Jackson v. Claw, 18 John. 346; Donnelly v. Donnelly, 8 B. Mon. 113; Woods v. Woods, 2 Bay, 476; Chapman v. Cooper, 5 Rich. L. 452; Spears v. Burton, 31 Missis. 547.

CHAPTER X.

THE DOCTRINE OF ESTOPPEL AS AFFECTING PARTIES CLAIMING UNDER THE HUSBAND OF THE DEMANDANT.

§ 1-3. The rule at common law.	22. The rule in Michigan.
4-11. The rule in New York.	23. Ohio.
12-15. Maine.	24. Kentucky.
16-18. Massachusetts.	25. North Carolina, South Carolina, Mississippi, Alabama, Arkansas, Georgia, Iowa, Delaware, and Illinois.
19. Pennsylvania.	26-31. The general doctrine considered.
20. New Jersey.	
21. New Hampshire and Rhode Island.	

The rule at common law.

1. ACCORDING to the principles of the common law, if a tenant at will, or for years, make a feoffment in fee, his widow will be entitled to dower as against the feoffee and his heirs;¹ “for,” says Mr. Roper, “the feoffee, by accepting the conveyance, *admits* that the husband was seized in fee and entitled to pass it; and the feoffee and such claimants are *estopped* from showing that the husband had a less estate.”² But it is a controverted question whether this doctrine is applicable where a tenant for *life* makes a feoffment in fee. Mr. Preston maintains that there is no dower in such a case,³ and in this he is supported by the text of Brooke.⁴ On the other hand, it is laid down in Fitzherbert’s *Natura Brevium*,⁵ that the wife of a tenant for life who makes a feoffment in fee, shall have dower as against the feoffee, and Mr. Park, and Mr. Roper, concur in this statement of the law.⁶

¹ 3 Hen. IV., 6 a.; 13 Hen. IV., 13; 1 Inst. 31 b., and Hale’s note, *Ibid.*; Mosely v. Taylor, Sir Wm. Jones, 317; 1 Prest. Abstr. 355; Prest. Est. 555; Park, Dow. 44; 1 Roper, H. & W. 368.

² 1 Roper, H. & W. 368. See *Henley v. Webb*, 5 Madd. 407.

³ 1 Prest. Abstr. 355; Prest. Est. 555. ⁴ Bro. Ab. tit. Dow. fol. 235 b. pl. 30.

⁵ Fitzh. N. B. 150, margin.

⁶ Park, Dow. 44; 1 Roper, H. & W. 368. To the same effect, 1 Bright, H. & W. 345, pl. 31. See vol. i., ch. xii., §§ 31, 37; ch. xvii., § 19.

2. But where the acceptance of the conveyance does not necessarily admit a fee in the husband, the tenant is not estopped from showing the true nature of the husband's estate. Rolle, in his Abridgment,¹ states, upon the authority of the Year Book,² that if husband, tenant for life, grant a lease *pur autre vie* and die, his widow shall not have dower. And the reason is, that the lessee by accepting the lease merely admits that the husband had a power of demising for the life of some other person than himself. The lessee, therefore, not being estopped to show the husband's interest in bar to the widow's claim, such claim must be disappointed for want of the seizin of the husband of an estate of inheritance.³

3. The doctrine of estoppel in the instances above referred to, applies only as against the feoffee and those claiming under him. As against the persons lawfully entitled to the lands upon the expiration of the husband's estate, the widow can not claim dower, since they are not prevented from showing what interest he had in the premises. Her title to dower can continue no longer than the estate of the feoffee is permitted to endure.⁴

The rule in the American States.

4. In the American courts a number of cases have arisen involving the question whether, in proceedings for dower, parties claiming under the husband of the demandant, are estopped from denying his seizin. And the decisions upon this point are somewhat conflicting.

5. In New York, the question came before the supreme court in the case of *Bancroft v. White*,⁵ determined in 1803; and it was there held, Kent, Justice, delivering the opinion, that a person holding under conveyances in fee deduced from the husband of the demandant, is estopped from controverting the seizin of the husband. The same point arose in *Hitchcock v. Harrington*,⁶ and was determined in the same way. "The objection of the want of seizin,"

¹ Roll. Ab. tit. Dow. p. 676, pl. 45.

² 3 Hen. IV., 6.

³ 1 Roper, H. & W. 369.

⁴ 1 Roper, H. & W. 368; Fitzh. N. B. 150, margin. See vol. i., ch. xii., § 31; ch. xiv., § 2.

⁵ *Bancroft v. White*, 1 Caines' Rep. 185.

⁶ *Hitchcock v. Harrington*, 6 John. 290.

said Kent, Ch. J., "can not be received from the defendants, as they hold under the husband by virtue of conveyances from his son and heir at law. The husband died in possession without any previous entry or foreclosure by the mortgagee, and it ought not to be permitted to the heir or person claiming under him, and enjoying the estate, to deny the seizin of the ancestor. In *Taylor's case*,¹ it was held, that if a tenant at will or for years made a feoffment in fee and died, and his wife brought dower against the feoffee, he could not plead that the husband was not seized." And in *Collins v. Torry*,² the principle was reaffirmed, that "the tenant deriving title by mesne conveyances from the husband of the demandant, can not deny the seizin of the husband." So in *Hitchcock v. Carpenter*,³ it was held, that a defendant claiming under the heir of the husband is estopped from denying the seizin of the latter. In *Davis v. Darrow*,⁴ the demandant was the widow of an alien, but as the defendant derived his title from, and held the premises under the deceased husband, the court refused to permit him to avail himself of the defence of alienage.⁵

6. In the foregoing cases, the parties against whom the doctrine of estoppel was applied, not only derived title, directly or mediately, from the husband, and enjoyed the lands in virtue of the title so acquired, but there was no pretence that they had been invested with any other or better right. Subsequently, however, in *Bowne v. Potter*,⁶ the doctrine was materially extended, and it was there held, that in ejectment for dower, where the defendant obtains possession by virtue of a conveyance from the grantee of the husband, he is estopped from showing that the husband had not title to the premises, and that after his purchase, on an action being brought against him by the real owner for the recovery of the land, he acquired the true and paramount title. "It must be conceded," said Nelson, C. J., "that if the husband had entered into a contract of sale, or given a lease for life or years, instead of this deed, the defendant would not be permitted to deny his title by way of

¹ *Mosely v. Taylor*, 34 Eliz., cited in Sir W. Jones, 317.

² *Collins v. Torry*, 7 John. 278.

³ *Hitchcock v. Carpenter*, 9 John. 344. See, also, *Embree v. Ellis*, 2 John. 119; *Jackson v. Waltermire*, 5 Cow. 301; *Dolf v. Basset*, 15 John. 21.

⁴ *Davis v. Darrow*, 12 Wend. 65.

⁵ See a similar ruling in *Georgia*, post, § 25.

⁶ *Bowne v. Potter*, 17 Wend. 164.

defence to the claim of dower; or set up title in a third person. While occupying under his vendor or lessor, he is not at liberty to purchase in even a better title, and thus dispute the title by which he acquired the possession. He would not be permitted to dispute the title of the heir of the lessor in an action to recover the remainder on the expiration of the lease; and I do not perceive how the claim of the widow can be distinguished from that of the heir. She holds under the title of the husband, like the heir, and her interest is one which has never been sold or parted with, and in this respect is like the estate or remainder recoverable by the heir." This decision is referred to without question as to its correctness, in *Jewell v. Harrington*,¹ determined shortly afterwards.

7. In *Sherwood v. Vandenburg*,² which was an action for dower, and in which the subject of estoppel again came up for consideration, Cowen, J., remarked as follows: "I should be very glad to distinguish this case from *Bowne v. Potter*, but it is precisely the same, except in the want of warranty in the deed from the husband to Paddock. No particular stress was laid on the warranty, however, in *Bowne v. Potter*. Chief Justice Nelson there put the estoppel upon the naked fact that the defendant claimed through a deed from the husband. That the defendant's claiming under the husband, or his heirs, works an estoppel, had before been repeatedly and strongly asserted by this court. The case of *Bowne v. Potter* underwent a good deal of examination, though it proceeded mainly upon the authorities I have mentioned, and others, cited in them from the English books, which were explained and understood to raise the doctrine of estoppel, and this, too, by very learned judges, among whom was the late Chief Justice Kent. In our series of cases, the question seems to have been expressly considered in all its phases with reference to that doctrine, if we except mutuality; and on the want of that, I see the notion of an estoppel has been denied by the English C. B. in *Gaunt v. Wainman*.³ The court say, in effect, the widow is not a party or privy. She claims by title paramount. She is not estopped; and therefore the tenant is not. Suppose, said Tindal, Ch. J., the husband had been seized

¹ *Jewell v. Harrington*, 19 Wend. 471, 474.

² *Sherwood v. Vandenburg*, 2 Hill, 303.

³ *Gaunt v. Wainman*, 3 Bing. N. C. 69. See post, § 31.

of a freehold, and the defendant had purchased the land of him as leasehold, would this have estopped the widow? Perhaps that view is conclusive, but it was involved in all the cases decided by this court, and was, in effect, repudiated by them. I will not deny that the question may be a very fit one for review in the court of errors. I think it may; but there is no conflict in the decisions of this court, and I do not see that we can properly revise them." Shortly afterwards, in *Osterhout v. Shoemaker*,¹ Bronson, J., adverting to the previous decisions, observed: "I have not forgotten the cases which hold that in dower the grantee of the husband is estopped to deny the grantor's title. But those cases are to be followed because the rule has been so settled, and not because it rests on any sound principle."

8. In consequence, probably, of the intimations thrown out by judges Cowen and Bronson in the cases cited in the preceding section, the question was finally carried to the court of appeals, where, after full discussion, the rule formerly applied was essentially modified. In a suit for dower, the defendant offered to show that the husband of the demandant never had any estate in the premises of which she was dowable, but that his estate was a leasehold merely. The evidence so offered was excluded on the ground that as the husband, while in possession, had assumed to convey in fee, though by a quit-claim deed only, and as the defendant held under the conveyance so made, he was estopped from setting up that the husband had not an estate of which his wife was dowable. In the court of appeals this ruling was pronounced erroneous and the judgment reversed, that court holding that "in ejectment for dower against a grantee of the husband by *quit-claim deed*, or a person holding under such grantee, the defendant is not estopped from showing that the husband was not seized of such an estate in the premises as to entitle his widow to dower."² "I am of opinion," said Wright, J., referring to the rejection of the proffered evidence on the trial, "that it will be difficult to rest this decision upon sound principle, or to reconcile it with the doctrine of estoppels, as generally understood and expounded by the courts; although I am aware that there are several cases in our own courts that hold that a grantee of the husband is estopped from denying his seizin

¹ *Osterhout v. Shoemaker*, 3 Hill, 513.

² *Sparrow v. Kingman*, 1 Comst. 242; s. c. 12 Barb. 201.

in an action of dower brought by the widow. Perhaps the case of *Bowne v. Potter*,¹ is the only one that may be said to entirely assimilate with the present. The error originated in a *dictum* of a judge of the supreme court, in an early case, and has been followed until the present time; recently, not because the misapplication of the law of estoppels was not distinctly seen by the learned judges who sat in the supreme court, but for the reason that the rule had been conclusively settled for them by repeated adjudications of their predecessors. Here, however, the question is not *res adjudicata*, and we shall be at liberty to reject the rule, if it shall be found on examination irreconcilable with the doctrine of estoppels *in pais*, and unsupported by principle, or binding authority. . . . The circuit judge grounded his decision upon the fact 'that Kingman, when in possession, had by his deed to Holley, *assumed to convey a fee*.' This, it seems to me, was an unwarrantable construction of the deed. It was an ordinary quit-claim, that might be, and often is used, to pass an estate less than a fee. Kingman, by giving it, could assume nothing in relation to the extent or nature of the estate. The law fixes the force and effect to be given to the instrument. It could pass no greater estate or interest than the grantor himself possessed at the delivery of it. Had Kingman been a tenant for life or years, or seized in fee, all his title, estate or interest would have passed to the grantee by the conveyance which he executed, and nothing more.² The deed, therefore, from Kingman to Holley assumed to pass whatever estate and interest Kingman had, without specifically defining it. If the grantor, then, might show that no title passed by his quit-claim, and recover the land in opposition to it, why should the mouth of his grantee be closed from denying that he received an estate in fee from him, or that, indeed, any title passed by his conveyance? Apply the rule of mutuality, and it is impossible to assign a valid reason. Both parties must be bound, or intended to be, else neither is concluded. There can be no soundness in the principle of estopping a grantee from showing that no interest passed to him by the deed of the grantor, while the latter is permitted to show it. But it may be further observed, that this was an action for dower brought by Kingman's widow, and had Kingman conveyed the premises to Holley, with covenant of war-

¹ *Bowne v. Potter*, 17 Wend. 164; ante, § 6.

² 1 R. S. 739, §§ 142, 143, 145.

ranty, and thereby, by the doctrine of equitable estoppel, concluded himself from denying that a title passed by his deed, the widow could not have been affected. His covenant could not have estopped her. She would have been neither a party nor privy, but a stranger to the conveyance, claiming by paramount title. She would not be concluded, if the grantor was, and by the rule of mutuality, as against a stranger, the grantee should not be."

9. "It is contended," the learned judge proceeded, "that the grantee is concluded by acceptance of the deed. But, waiving the doctrine of mutuality, this can not be, unless there be an estate which has actually passed to the grantee by it, co-extensive with its description in the conveyance. The mere acceptance of a deed-poll, when no interest actually passes by it, surely can not conclude the party accepting. Such a conclusion would be totally irreconcilable with every principle of the law of estoppel *in pais*. Lord Coke, in treating of estoppels *in pais*, includes that 'by acceptance of an estate,' but he distinctly illustrates his meaning by an example which he gives of a case put by Littleton, viz.: of a common law assurance by feoffment without writing accompanying it.¹ Such an assurance operated on the possession, and if correctly pursued, always passed a freehold or fee simple to the feoffee. But in the case of a conveyance by grant, bargain and sale, or release, in which it is never necessary that actual possession should accompany the deed, the very point is whether an estate existed in the grantor, and has passed, to be accepted. In Taylor's case,² which has been relied on to sustain the doctrine that a grantee is estopped in dower cases to deny the seizin of the husband, it was held, that if a tenant at will, or for years, make a feoffment in fee and died, and his wife brought dower against the feoffee, he could not plead that the husband was not seized.³ This is the case of a tortious feoffment, in which the feoffee has obtained and retains the actual seizin of the lands by a wrong, in which he is in some degree a willing participant. It is to be remembered that to make a valid feoffment, nothing was wanting but possession, and when the feoffor had possession, though a mere naked one, a freehold or fee simple passed to the feoffee by reason of the livery. This livery of seizin was the investiture or delivery of corporal possession of the land to the

¹ See vol. i., ch xii., §§ 2, 3.

² Mosely v. Taylor, 34 Eliz. cited in Sir W. Jones, 317.

³ See ante, § 1.

feoffee, and was absolutely necessary to complete the gift. It was a corporal transfer of the soil from one man to another, taking effect *in præsenti* or not at all. The feoffee was a principal actor in the transfer, and passed at once into the full enjoyment of the fee.¹ The feoffment, which could not be made without an acceptance of the possession by the feoffee, whether tortious or not, operated as a disseizin of the owner, and although he had a right of entry by action in the case of a tortious disseizin, that right might be tolled by a descent cast. Consequently it will be seen that the acceptance of an estate passed by feoffment and livery of seizin differs widely from the acceptance of a modern conveyance by grant in which it is never necessary to give it validity, to enter and take corporal possession of the land, and by which the grantee may obtain a fee, or a less estate, or no estate at all. The former was one of those solemn, notorious acts *in pais* to which the common law attaches peculiar and extraordinary efficacy and importance; as much so as to matters shown by record or writing under seal. Hence, Lord Coke, in enumerating estoppels *in pais* includes such an acceptance. But who ever heard, at common law, that where an interest in lands was attempted to be conveyed by deed-poll, without livery, that the grantee who accepted the deed was estopped from controverting the seizin of the grantor, or, in other words, from showing that nothing, or a less estate than a fee, passed by such deed."

10. Bronson, J., dissented. "As to one-half of the Erie Mills," he said, "the defendant derived his title and possession from George G. Kingman, the plaintiff's husband, and still holds under that title. So long as he thus holds, he is estopped from denying the seizin of the husband, in an action brought by the widow to recover her dower. Questionable as I think this doctrine was at the first, it has prevailed too long in this State to be now overturned by a judicial decision. If there is any good reason for changing the rule, the change should be made by the legislature, and not by the courts. . . . So long as those claiming under the husband have not been disturbed in the enjoyment of the property, there is no very good reason for allowing them to defeat the widow's claim to dower, by setting up an outstanding title which may never be asserted; and the current of adjudication in this State has not carried the estoppel beyond cases of that description. There is, I

¹ Litt. §§ 595, 599, 611, 698; Co. Litt. 366, 367 a.; 2 Bl. Com. 310, 313.

admit, no principle upon which the estoppel can be carried another step and applied to a case where the husband's grantee has been obliged to purchase in a good outstanding title for the purpose of protecting his possession; and if the case of *Bowne v. Potter*¹ must be considered as going that length, I agree that it can not be supported. But there is no such question in this case."

11. In *Averill v. Wilson*, and in *Hill v. Hill*,² the case of *Sparrow v. Kingman* was regarded as establishing the rule, that in proceedings for dower the grantee of the husband is not estopped to deny the seizin of the latter. In that case, it will be observed, stress was laid upon the fact that the conveyance by the husband was a quit-claim only; but subsequently the doctrine was broadly laid down, that in ejectment for dower against a person claiming under a deed in fee from the husband with full covenants, the defendant is not estopped from showing that the husband had not a dowable estate in the premises.³

12. In Maine, also, there have been a number of decisions upon the question now under consideration. In *Kimball v. Kimball*,⁴ the defendant, who claimed under the husband of the demandant, offered to prove that the title of the husband was founded on a conveyance made by an insolvent grantor to defraud creditors. The evidence was rejected. "On legal principles," the court remarked, "the defence is equally destitute of foundation. No man is permitted to deny the title under which he claims and holds. This is a common principle." In *Nason v. Allen*,⁵ the husband, being seized of a remainder in fee expectant upon an estate for life, mortgaged the premises in fee. After his death, his widow brought an action of dower against the mortgagee, and it was held, that the latter was estopped to deny the seizin of the husband. And in *Hains v. Gardner*,⁶ the same principle was applied. "This court," said the judge who delivered the opinion, "has repeatedly recognized the principle, that a person holding under a conveyance in fee from the husband of the demandant in dower, is estopped from controverting the seizin of the husband. If, therefore, the tenant in this case holds under a deed from the plaintiff's husband, executed sub-

¹ *Bowne v. Potter*, 17 Wend. 164; ante, § 6.

² *Averill v. Wilson*, 4 Barb. 180; *Hill v. Hill*, Ibid. 419, 429.

³ *Finn v. Sleight*, 8 Barb. 401; *Kingman v. Sparrow*, 12 Barb. 201.

⁴ *Kimball v. Kimball*, 2 Greenl. 226.

⁵ *Nason v. Allen*, 6 Greenl. 243.

⁶ *Hains v. Gardner*, 10 Maine, 333.

sequent to the marriage, all the facts in the agreed statement tending to show that the husband was not seized during coverture, are inadmissible as evidence, and can have no effect upon our decision." So in *Smith v. Ingalls*,¹ where the tenant held under a deed of release from the demandant as executrix of her husband's will, conveying the testator's interest in the premises, subject to her right of dower, and who disclosed no other title, the same rule was applied. "Had the tenant been seized of the land in which dower is demanded," said the court, "by a distinct title, before his purchase from the executrix, the case might have borne some resemblance to that of *Fox v. Widgery*,² cited for the tenant. But all the title he has comes from the husband. No other appears with which he connects himself."

13. In *Knight v. Mains*,³ the tenant took a deed from the State, containing the following reservation in favor of the widow of one who died in possession of the premises: "Reserving to E. M., formerly the wife of J. M., a life estate in the same, to one-third thereof, in the same manner she would have been entitled to her right of dower in the premises, if her husband, J. M., had died seized of the same in his own right; and she shall be entitled to the privilege of having the same set off to her in the same manner she would have been, had the said lot been the property of said J. M., at the time of his decease." The grantee was not permitted to resist the claim of E. M. to dower.⁴

14. It has been held, also, in the same State, that where two persons join in a conveyance with covenants of warranty, and there is no designation of the manner in which the estate was held by them, and the grantee enters and enjoys the premises thereunder, he can not, in a suit for dower, deny the seizin of either of the grantors;⁵ nor can he show that one of them was seized of a larger proportion than the other.⁶ And the general doctrine of the previous cases upon the subject was reaffirmed in *Thorndike v. Spear*;⁷ but shortly afterwards the rule was qualified to some extent by a

¹ *Smith v. Ingalls*, 13 Maine, 284.

² *Fox v. Widgery*, 4 Greenl. 214. See post, § 28.

³ *Knight v. Mains*, 12 Maine, 41.

⁴ See, also, *Campbell v. Knights*, 24 Maine, 332; *Cochrane v. Libby*, 18 Maine, 39; *Carter v. Parker*, 28 Maine, 509; *Mann v. Edson*, 39 Maine, 25.

⁵ *Hamblin v. Bk. of Cumberland*, 19 Maine, 66; *Stimpson v. Thomaston Bk.*, 28 Maine, 259.

⁶ *Ibid.*

⁷ *Thorndike v. Spear*, 31 Maine, 91.

decision to the effect that although one claiming under a conveyance from the husband is estopped to deny the seizin of the latter, he is, nevertheless, entitled to show that the seizin was not of such a character as to confer a right of dower.¹ "It is insisted," the court said, "that the tenant is estopped to deny the seizin of the husband, as he holds the estate by a title derived from him. While he may not be permitted to deny that the husband was seized, he may be permitted to show the character of that seizin, and that it was not such that his widow would be entitled to dower." And in the recent case of *Foster v. Dwinel*,² in which the previous cases were reviewed and a strong disposition manifested by the court to retrace their steps and adopt the rule as now settled in New York, it was held, that a tenant claiming title under a deed of quit-claim from a mortgagee, executed before foreclosure, is not estopped, in an action of dower by the widow of the latter, from showing that her husband's seizin was only that of a mortgagee.³

15. In an action to recover dower, the demandant, as evidence of her right, introduced a mortgage deed of the premises given many years before by her husband, on which deed appeared an assignment by the mortgagee to one from whom the tenant, by several mesne conveyances, derived title. In the absence of evidence that the assignee ever claimed title under the mortgage, or had any knowledge of the assignment, it was held that the tenant was not estopped to deny that the husband had title during the coverture.⁴

16. In Massachusetts, in an early case, the deed to the husband of the demandant was shown to have been made at a time when his grantor was disseized of the premises in question, and therefore disabled, under the laws of that State, to make a valid conveyance. The husband never entered, but subsequently conveyed to the disseizor, who remained in possession. The tenant, who derived title under the latter, was allowed to give evidence of the above facts, and the claim for dower was disallowed.⁵ The court said: "As to the supposed estoppel, whatever might be its operation in an action against Conant (the disseizor), it can not bind the present tenant, whose title is independent of the deed from Small, (the husband of

¹ *Gammon v. Freeman*, 31 Maine, 243.

² *Foster v. Dwinel*, 49 Maine, 44.

³ It was decided in *Manning v. Laboree*, 33 Maine, 343, that an outstanding title purchased by the defendant after the commencement of an action of dower against him, can not be set up in bar of the suit.

⁴ *Kidder v. Blaisdell*, 45 Maine, 461.

⁵ *Small v. Procter*, 15 Mass. 495.

the demandant). Nothing passed by that deed; so that it could not work on the interest in the land so as to run with it. Conant, however, was not estopped to deny the seizin of Small. The grantee may be permitted to show that his grantor was not seized, as is every day allowed in actions of covenant."

17. But in *Wedge v. Moore*,¹ in the same State, it was held, that if one tenant in common of land occupy the whole, and convey it in fee, his grantee is estopped, in a writ of dower brought by the widow of the grantor, to deny the title and seizin of the latter in the whole estate. "The case finds," the court observed, "that the demandant's husband had a deed from his father of one undivided half of the mill lot; that he occupied the lot and took upon himself to convey the whole, which gave him a freehold by disseizin; and the only title by which the tenant claims the whole, is a deed from the demandant's husband; he is therefore estopped from denying his grantor's seizin."

18. In another case, a grantee of lands entered, supposing the premises purchased to be correctly described in his deed, and died in possession. His administrator sold the lands to the defendant, who, discovering that by reason of misdescription the estate was not embraced in the grant to the decedent, procured a quit-claim from the original grantor, in which the lands were described as the same intended to be conveyed by the former conveyance. The court allowed dower to the widow of the deceased grantee, holding that the release procured by the tenant operated simply as a confirmation of the title derived from the administrator. The question of estoppel was raised and argued, but not decided.²

19. In an action of dower in Pennsylvania, in which the right of the widow was denied, the latter, to show title in her husband, gave in evidence a conveyance in fee to him from the defendant. It was held, that by appearing and controverting the right of the demandant, the defendant claimed to be tenant of the freehold, and could not, therefore, set up title in a mere stranger under whom no one was claiming the premises.³

¹ *Wedge v. Moore*, 6 Cush. 8.

² *Hale v. Munn*, 4 Gray, 132. See vol. i., ch. xx., § 5.

³ *Evans v. Evans*, 29 Pa. St. 277. Where a conveyance without words of inheritance in the granting clause, contained a covenant of warranty in fee simple, it was held that the covenant operated by way of estoppel, and that the widow of the grantee might defend her possession under such estoppel, as against a subsequent lessee of the grantor with notice of the deed. *Shaw v. Galbraith*, 7 Barr, 111.

20. In New Jersey, the doctrine of estoppel has been applied to cases for dower, without material qualification. Thus, in *Hyatt v. Ackerson*,¹ it was laid down as the law, that a defendant in dower who claims title to the premises in question by deed from or under the husband of the demandant, can not be admitted to deny the seizin of the husband, so as to defeat the widow's dower, she being in all other respects, entitled to recover; and that there is no difference between a defendant in dower who purchases by direct conveyance from the husband, and one who holds under a sheriff's deed. The same principle has been recognized in other cases.²

21. In New Hampshire, it is held that a party claiming under the husband of a demandant in dower, is not estopped from showing that the husband was not seized of a dowable estate. This point was determined in *Moore v. Esty*,³ where it appeared that the estate of the husband was subject to an outstanding estate of freehold, and consequently did not confer a right of dower.⁴ In the course of an examination of the earlier New York cases, the court said: "In *Hitchcock v. Carpenter*,⁵ it was held, according to the report of the case, in an action of dower, that, as the tenant claimed under the heirs of the husband, who had been in possession, he was estopped to deny the seizin of the husband. These circumstances afforded strong *prima facie* evidence of a seizin, but certainly did not amount to an estoppel. For, can it be doubted, that if, in such a case, it could be shown that the husband, although in possession, never had any estate in the land, except a remainder or a reversion after an estate for life, that this might be shown to defeat the claim of dower? We think not. The cause was correctly decided, but the court used the word estoppel in a new sense, or the case is not accurately reported. . . . It is possible that there may be cases in which a tenant in a writ of dower, who claims under the husband, can not be permitted to set up the title of a stranger to disprove the seizin of the husband. But there is no pretence that there is anything in the circumstances of this case which can preclude the tenant from showing that the husband was never so seized as to entitle this demandant to dower." So where the husband of the

¹ *Hyatt v. Ackerson*, 2 Green, 564.

² *Montgomery v. Bruere*, 2 South. 865; *Thompson v. Boyd*, 2 Zab. 543. See *English v. Wright*, Coxe, 437.

³ *Moore v. Esty*, 5 N. H. 479.

⁴ Vol. i., ch. xv.

⁵ *Hitchcock v. Carpenter*, 9 John. 344; ante, § 5.

demandant, having a reversion in expectancy, joined with the owner of the immediate estate in a conveyance in fee to the tenant, with covenants of warranty; under which conveyance the tenant entered into possession, it was held that the tenant was not estopped by such deed and possession from showing the true title of the husband, and that under it the widow had no claim of dower.¹ A similar ruling was made in Rhode Island, in the case of *Gardner v. Greene*.²

22. The following case was determined in Michigan: M., in 1815, conveyed certain premises by warranty deed to R., who afterwards died; and E. R., his widow, applied for a confirmation of the title to the governor and judges of the Territory of Michigan, as the widow and legal representative of R., under the Act of Congress of April 21, 1806, entitled "An act to provide for the adjustment of titles of lands in the town of Detroit and Territory of Michigan, and for other purposes," placing her application on the deed from M. to R.; and in pursuance of such application the premises were deeded to her. In an action for dower brought by the widow of M., it was held that E. R., and those claiming under her, were estopped by the deed from M. to R., from denying the seizin of M.³

23. In Ohio, in the case of *Coakley v. Perry*,⁴ a party in possession under a *bonâ fide* claim of title, purchased in an outstanding tax title in order to remove the incumbrance from the lands and the cloud from his own title. The holder of the tax title had never been in possession, nor had he asserted any right to the possession. After his death, his widow instituted proceedings for dower against the true owner of the premises, and it was insisted, that by accepting a deed from her husband the defendant was estopped to deny his seizin. But the court, after careful consideration of the question, came to a contrary conclusion. "The decisions in this country," they said, "in which the grantee and those claiming under him were held to be estopped to deny the title of the grantor, were cases in which the grantee received and held possession under the conveyance, and relied upon it as his source of title, and not where the grantee held the title under a prior and independent conveyance."⁵ In a later case, while the foregoing doctrine was in no degree qualified, it was nevertheless held, that where a party has gone into possession under a conveyance containing covenants

¹ *Otis v. Parshley*, 10 N. H. 403.

² *Gardner v. Greene*, 5 R. I. 104.

³ *May v. Tillman*, 1 Mann. 262.

⁴ *Coakley v. Perry*, 3 Ohio St. 344.

⁵ See post, §§ 27, 28.

of general warranty, and has continued in possession, deriving neither title nor possession from any other source, he will not be permitted to question the title of his grantor in an action brought by the widow of the latter to recover her dower.¹ The observations of the court upon this point were as follows: "There is much diversity in the authorities as to the existence, origin, and just application of the rule which prohibits a grantee in fee from denying the title of his grantor. Some of the cases deny its application altogether to persons standing in such relation to each other; while others annex the qualification, 'especially, if the grantee does not receive possession from the grantor.' Some cases assert that there is no *legal* estoppel in such cases, but that the '*moral policy of the law*' will not permit the grantee to deny the title of him from whom he received and still holds the possession. In some cases it is held, that the receiving and retaining possession under such circumstances, is only a *prima facie* admission by the grantee of the title and right of his grantor, and that he is still at liberty to prove a title in himself, derived from other sources; while others limit this right of the grantee to cases in which he did not acquire his possession from the grantor whose title he disputes, or by virtue of his conveyance, but obtained it under some other title or claim. and that such grantee must be permitted to *buy his peace*, without prejudice to his rights. . . . Notwithstanding the apparent disagreement in the cases cited, the decided weight of these authorities, so far as they relate to the case made in the bill of exceptions, seems to be, that where one enters into the possession of land under and by virtue of a conveyance in fee, with covenants of warranty from another, and retains that possession, relying upon the grant, or the possession under it, in aid of his title or possession, he can not deny the title thus acquired against the grantor and those claiming under him; and it is not material whether this preclusion is founded upon a *legal estoppel*, or the '*moral policy of the law*,' alluded to by Ch. J. Marshall in 7 Wheaton.² It is equally effective in either case, and the latter principle would seem to apply to conveyances without, as well as with, warranty."

24. In *Kentucky*, in *Dashiel v. Collier*,³ the law was held substantially as in the case last cited. According to the decision there

¹ Ward v. McIntosh, 12 Ohio St. 231.

² Blight's Lessee v. Rochester, 7 Wheat. 535; post, § 26.

³ Dashiel v. Collier, 4 J. J. Marsh. 601. See Wall v. Hill, 7 Dana, 172.

made, if a party acquire his right and possession under a deed from the husband, he is estopped from denying the title of the latter; but he may show that he holds under a superior title, and independently of the conveyance from the husband. It has been determined, also, in the same State, that if a tenant who has entered under the husband be evicted by a paramount title, and afterwards acquire that title and hold possession under it, the widow has no right of dower as against him. And proof of these facts is not inconsistent with any obligation or estoppel resulting from the conveyance by the husband.¹ And in a later case it was held, that a purchaser is not estopped by the husband's deed from explaining the nature of his seizin, and showing that it was not of such a character as entitled his wife to dower.²

25. In North Carolina, also, the doctrine of estoppel is applied against a party claiming under the husband.³ Nor can he, for the purpose of defeating the claim to dower, avail himself of a title obtained subsequently to the commencement of the suit and his plea thereto.⁴ In South Carolina⁵ and Mississippi,⁶ the rule is the same. A tenant who occupies and enjoys an estate under the husband's title will not be permitted to take advantage of a defect therein. But in the former State he may show that the husband was a mere trustee, and conveyed in execution of the trust, and thus defeat the claim to dower.⁷ Upon this point, similar decisions have been made in Alabama⁸ and Arkansas.⁹ In the former State it has also been determined, that when the defendant takes nothing by the husband's deed, he is not estopped from showing the truth in answer to a claim for dower.¹⁰ So the gratuitous payment of rent by one in possession, does not estop him from showing the true character in which he holds the premises.¹¹ And in Mississippi

¹ *Hugley v. Gregg*, 4 Dana, 68.

² *Gully v. Ray*, 18 B. Mon. 107.

³ *Norwood v. Marrow*, 4 Dev. & B. Law, 442; *Love v. Gates*, *Ibid.* 364.

⁴ *Norwood v. Marrow*, 4 Dev. & B. Law, 442.

⁵ *Gayle v. Price*, 5 Rich. L. 525; *Pledger v. Ellerbee*, 6 Rich. L. 266; *Hill v. Robinson*, 1 Strobb. 2, 3.

⁶ *Randolph v. Doss*, 3 How. (Miss.), 205; *Wooldridge v. Wilkins*, *Ibid.* 368.

⁷ *Plantt v. Payne*, 2 Bailey, 319.

⁸ *Edmondson v. Welsh*, 27 Ala. 578.

⁹ *Crittenden v. Woodruff*, 6 Eng. 82. In this case, the correctness of the doctrine of the early New York cases on the subject of estoppel, is controverted. Upon the proposition to which the case is here cited, see, also, *Babcock v. Wyman*, 19 How. U. S. 289. See, upon the general doctrine, *Blakeney v. Ferguson*, 20 Ark. 547.

¹⁰ *Edmondson v. Montague*, 14 Ala. 370.

¹¹ *Shelton v. Carrol*, 16 Ala. 148.

a purchaser who has received a deed with covenants of warranty, "excepting only the widow's right of dower," is not estopped by such exception from controverting the fact of the marriage.¹ In Georgia the tenant is estopped from setting up the alienage of his vendor as a defence in an action of dower brought by the widow of the latter.² In Iowa the doctrine of estoppel as against a party deriving title from the husband, is also recognized and applied.³ In Delaware, the heir is held to come within the operation of the same rule. Where his mother claims dower in the lands descended to him, he can not controvert the seizin of his father.⁴ But in Illinois, a grantee may deny the title and seizin of the grantor, and show that he claims under another title.⁵

The general doctrine considered.

26. The propriety of a strict application of that principle of the doctrine of estoppel which forbids a denial of title, to parties sustaining the relation of vendor and vendee, has been questioned by high authority. The subject came under review in the Supreme Court of the United States, in the case of *Blight's Lessee v. Rochester*,⁶ in which Ch. J. Marshall traces the origin of the doctrine back to the feudal tenures, "when the connection between landlord and tenant was much more intimate than it is at present; when the latter was bound to the former by ties not much less strict, nor not much less sacred, than those of allegiance itself." And he adds: "The propriety of applying the doctrines between lessor and lessee to a vendor and vendee, may well be doubted. The vendee acquires the property for himself, and his faith is not pledged to maintain the title of the vendor. The rights of the vendor are intended to be extinguished by the sale, and he has no continuing interest in the maintenance of his title, unless he should be called upon in consequence of some covenant or warranty in his deed. The property having become, by the sale, the property of the vendee, he has a right to fortify that title by the purchase of

¹ *Stevenson v. McReary*, 12 Smedes & M. 57.

² *Chapman v. Schrøder*, 10 Geo. 321. See ante, § 5, for a similar holding in New York.

³ *Davis v. O'Ferrall*, 4 G. Greene, 358.

⁴ *Griffith v. Griffith*, 5 Harring. 5. See *Bardley v. Clayton*, Ibid. 154.

⁵ *Owen v. Robbins*, 19 Ill. 545. See *Wooley v. Magie*, 26 Ill. 526.

⁶ *Blight's Lessee v. Rochester*, 7 Wheat. 535; 5 Cond. U. S. Rep. 334.

any other which may protect him in the quiet enjoyment of the premises. No principle of morality restrains him from doing this; nor is either the letter or spirit of the contract violated by it.”¹

27. It is scarcely possible to harmonize the various decisions upon this subject, or to extract from them any satisfactory rule of general application. But the opinion may be ventured, that in New York, until the case of *Bowne v. Potter*,² the courts, in the application of the doctrine of estoppel in favor of the dowress, had been guilty of no departure from principle; nor, as it would appear, had the rule administered by them, worked any substantial injustice. In all the earlier cases in that State, involving this question, the party in possession had derived his title from or under the husband; enjoyed the property in virtue of that title, and pretended to no other or better right. Under these circumstances there would seem to be gross injustice in permitting any defect of title, or unasserted outstanding right to be interposed in the way of a claim to dower;³ and notwithstanding the doubts suggested by some of the later decisions, the rule forbidding this to be done, is supported by the clear weight of authority. But the case of *Bowne v. Potter*, presented an entirely different question. In that case, the tenant had been compelled to purchase in a superior title in order to protect his possession; and in holding that he could not avail himself of the title so acquired as a defence to a claim of dower by the widow of the first grantor, the court went far beyond the previous cases, and contrary to decisions made elsewhere.⁴ The strictures of Bronson, J., upon this ruling, seem to be just. “There is,” he said, “no principle upon which the estoppel can be carried another step, and applied to a case where the husband’s grantee has been obliged to purchase in a good outstanding title for the purpose of protecting his possession.”⁵ There is also much force in the reasoning of Chief Justice Marshall, quoted above,⁶ that the vendee has a right to fortify his title by the purchase of any other which may protect him in the quiet enjoyment of the premises. The case stands

¹ See, also, Rawle, *Covenants for Title*, 2d ed. 280, and cases there cited.

² *Bowne v. Potter*, 17 Wend. 164; ante, § 6.

³ See the remarks of Bronson, J., quoted ante, § 10.

⁴ *Dashiel v. Collier*, 4 J. J. Marsh. 601; *Hugley v. Gregg*, 4 Dana, 68; ante, § 24; *Smith v. Ingalls*, 13 Maine, 284, 287; ante, § 12.

⁵ In *Sparrow v. Kingman*, 1 Comst. 242; ante, § 10.

⁶ Ante, § 26.

alone in the extreme doctrine there held, the nearest approach to it being the North Carolina decision of *Norwood v. Marrow*,¹ in which, however, the outstanding title was obtained pending the suit and after plea.

28. It seems just, also, upon like reasoning, that a party in possession under an honest claim of title, should be permitted to quiet his possession and title by the acquisition of an adverse claim, without subjecting himself to the operation of the doctrine of estoppel in respect thereto. This is placed in a strong and clear light by the case of *Coakley v. Perry*,² already referred to. And it has been well said, that "one may fortify an existing title without putting it in jeopardy, if the rights of others are not thereby prejudiced; and by so doing he can not originate rights in others."³

29. Although, as has been remarked, a party in the enjoyment of an estate under the husband's title, ought not to be permitted to avail himself of defects therein, as against his widow, there are, nevertheless, frequent cases in which the husband has made a conveyance without having any real or substantial interest in the premises, and where the title conveyed was really not that of the husband, but of some third person for whom he was acting. Cases of estates held in trust are examples of this. The trustee is invested with no beneficial interest; the title is lodged in him for a particular purpose; and if he convey in execution of the trust, he is regarded as the mere instrument employed to pass the right and title of another. The grantee does not enter into the enjoyment of the estate as property derived from the husband, but as that of the parties for whom the husband was acting. And this principle applies not only where an express trust is created, but where, by operation of law, the holder of the legal title is treated as sustaining the relation of a trustee. A vendor of lands holds the title in trust for his vendee, and if he marry before a conveyance is executed, his widow has no dower in the estate.⁴ So where an equitable interest has been transferred, and the assignor is afterwards clothed with the legal title to enable him to complete his contract, the same rule applies.⁵ Nor, it would seem, does the fact that the trustee

¹ *Norwood v. Marrow*, 4 Dev. & Bat. L. 442; ante, § 25; *Manning v. Laboree*, 33 Maine, 343, was of the same character.

² *Coakley v. Perry*, 3 Ohio St. 344; ante, § 23.

³ *Thompson v. Thompson*, 19 Maine, 235. See *Fox v. Widgery*, 4 Greenl. 214.

⁴ Vol. i, ch. xix., § 30; ch. xxviii., § 15.

⁵ *Ibid.* ch. xx., § 50.

superadds his personal covenants, make any difference in the result.¹ Where the grantee takes an estate conveyed in execution of a trust, he can not, consistently with principle or the dictates of justice, be precluded from showing the real facts of the case. He is not in possession under the husband, in the sense in which that expression is used above, and therefore ought not to be subjected to the operation of the doctrine of estoppel.

30. So the husband may have a beneficial interest in lands, and yet confessedly not be seized of such an estate as will enable a right of dower to attach; and it is in this class of cases that the greatest difficulty arises in determining the rights of the widow. "A man," observes the court in *Foster v. Dwinel*,² "may have only the estate and right of a mortgagee, which will not give dower, and yet he may properly give a deed of the premises."³ There are many other cases where the title in the husband may give him a seizin and a right to convey his interest, and yet not in law give the wife a right of dower.⁴ . . . It would seem to be a great stretch of the doctrine of estoppel to say, that by *accepting* a deed from the husband, which in no way alludes to the matter of dower, or to the existence of a wife of the grantor, the tenant is not only estopped from denying an actual seizin of the husband, sufficient to enable him to give the deed, but is also estopped from denying that the seizin was such as to give a third person an independent right in the estate, although in truth no such seizin ever existed; thus creating an estate by a rule of law, where none ever before existed." There is certainly force in these suggestions; and where the instrument which confers upon the husband his right in the lands, does not assume to pass to him a dowable estate; as where it is a mortgage, or a lease for years, or a conveyance in express terms of a remainder expectant upon an estate for life; and where the conveyance executed by him is a proper one to pass that interest, and does not necessarily assume to convey a greater one, it would seem, upon principle, that the grantee should not be estopped to show the true nature of the husband's seizin. The difference between a case of this kind and one where the conveyance to the husband assumes

¹ Vol. i., ch. xx., § 50; *Gully v. Ray*, 18 B. Mon. 107.

² *Foster v. Dwinel*, 49 Maine, 44.

³ *Hutchins v. Carlton*, 19 N. H. 487; 15 N. H. 55.

⁴ See, as to *transitory* seizin, vol. i., ch. xii., § 36.

and was understood to vest him with the fee, and where he has made a like conveyance, is entirely manifest.

31. Where, however, even in a case of the character above stated, the husband has asserted a claim to the fee, and has expressly assumed to convey it, whether with or without covenants of warranty; and the grantee, relying solely on the title so acquired, enters and enjoys the estate without being disturbed by an adverse claimant, it would seem no more than reasonable that the widow should be allowed her dower. It is true, that in the English case of *Gaunt v. Wainman*,¹ a contrary doctrine was held, upon the ground that as between the widow and tenant there can be no estoppel, for want of mutuality. "Suppose," said Tindal, Ch. J., "he (the tenant) had bought the premises as a leasehold; would the demandant be estopped to say that they were freehold?" It may be remarked, however, that while the widow might not be concluded by any such action on the part of her husband, yet, as her right is derived from him, and her estate is a continuance of his, there would seem to be an inconsistency in denying to her any advantage or benefit resulting to her husband in respect to the estate.² It is also worthy of consideration, that in the event of a breach of covenants of warranty by the assertion of a paramount title, the husband, or his estate, must respond in damages; and the distributive share of the widow in the personalty be proportionately diminished. As she must, in this indirect manner, bear a portion of the responsibility attaching to the covenants, it is but just that she should share in the advantages resulting therefrom.

¹ *Gaunt v. Wainman*, 3 Bing. N. C. 69; 32 Eng. C. L. 42. See, also, *Gardner v. Greene*, 5 R. I. 104; Rawle, *Covenants for Title*, 2d ed. 459, *et seq.*

² "It seems that a feme who claims dower shall have advantage of an estoppel by deed between her baron and the tenant." Park, Dow. 297; Roll. Abr. *Estoppel*, (L.) pl. 1, cites 3 Hen. IV., 6, *dubitatur*. "Privies in blood, as the heir; privies in estate, as the feoffee, lessee, &c., *privies in law*, as the lords by escheat, tenant by the curtesie, *tenant in dower*, the incumbent of a benefice, and others that come under by act in law, or in the *post*, shall be bound and take advantage of estoppels." Co. Litt. 352 a. See further upon the subject discussed in the text, 2 Smith's L. C., 6th Amer. ed., 712-13, 717, 771-6.

CHAPTER XI.

ESTOPPEL OF THE WIDOW FROM ASSERTING DOWER.

§ 1-15. By the acceptance of a collateral satisfaction.

16-20. By the acceptance of an estate inconsistent with dower.

21-29. When widow estopped by her covenants.

30. When widow estopped by the covenants of her ancestor.

31. Effect of covenants by a second husband.

32. When not estopped by release.

33. Effect of sale for taxes.

34-47. What acts of the widow will operate as an estoppel.

48-55. Election to take statutory provision.

56-60. Decree upon mortgage not executed by the wife.

By the acceptance of a collateral satisfaction.

1. IN the courts of law, the general rule is, that a right of dower can not be barred by a collateral satisfaction; or by the assignment to the widow of lands in which she is not dowable; or of a rent issuing out of them. Nor does it make any difference that she consents to the assignment so made. The acceptance by her of a compensation in lieu of dower to which she is entitled of common right, must, in order to constitute a legal bar, either be of some part of the lands of which she is dowable, or of a rent issuing out of them, and for such an interest as may endure for her life.¹

2. But in equity, a different rule prevails, and the acceptance of a freehold interest in other lands, or of a term of years, or of a sum of money, or of any other kind of collateral satisfaction, will constitute a good bar to a claim of dower.²

¹ Ante, ch. iv.; Co. Litt. 36 b.; Moor, 31; Cro. Eliz. 128, 274; Vernon's case, 4 Rep. 4; Dyer, 220 a.; 1 Roper, H. & W. 400, 461, 565; Conant v. Little, 1 Pick. 189; Jones v. Brewer, Ibid. 314; Jones v. Powell, 6 John. Ch. 194, 200; Warfield v. Castleman, 5 Mon. 517; Bullock v. Griffin, 1 Strobb. Eq. 60; Ellicott v. Mosier, 11 Barb. 574; Keeler v. Tatnell, 3 Zab. 62. As to jointures, and devises in lieu of dower, see post, chapters xv. and xvi.

² Hargrave's note, Co. Litt. 36 b.; 1 Roper, H. & W. 405; Mundy v. Mundy, 2 Ves. Jr. 122; Jones v. Powell, 6 John. Ch. 194, 200; Hunter v. Jones, 6 Rand. 541; Warfield v. Castleman, 5 Mon. 517; Shotwell v. Sedam, 3 Ohio, 5; Simpson's

3. In *Jones v. Powell*,¹ a testator devised certain lands to two trustees, to be sold, and the proceeds equally divided among his wife and children. The trustees sold the lands for their full value. The widow, who was the executrix of the will, was in possession, and refused to consent to the sale until another house and lot were provided for her and her children. The trustees purchased other premises in the same village, the widow participating in the negotiation, and a conveyance was taken to the widow and to the trustees jointly. She removed into the premises so purchased, and continued to occupy them undisturbed, and without the charge of rent for above twenty years. She declared at the time of the negotiation and purchase, and repeatedly afterwards, that she was perfectly satisfied with the arrangement, and that she considered the exchange beneficial to her, and that she had, during the negotiation for the purchase, agreed with the trustees to relinquish her right in the one house, if the purchase was made of the other. She was cognizant of the fact that costly improvements were being made on the property sold; and when applied to for an explanation of a rumor that she intended to assert a claim of dower, denied that she had ever authorized such a report. Under these circumstances she was held equitably barred. "After receiving such a compensation," said Chancellor Kent, "which she accepted as a satisfactory equivalent, it would be very unjust to allow her to set up her claim of dower. Her acquiescence in the equivalent for so long a period, during which the property has been within her own view, and has undergone great changes and expensive improvements, is an equitable estoppel, and ought to have barred her conscience from the assertion of this claim. It is an act of fraud upon the purchasers, and to be condemned upon every principle of policy and morality. At law, the wife can only be opposed by a legal bar; but now, says Lord Loughborough,² equitable bars are in daily practice. If the dry legal title be in controversy, it must be made out at law; but otherwise the court of chancery has a concurrent jurisdiction;³ and in these cases of equitable bars, its jurisdiction is exclusive. . . . There is no reason why a widow, who is a free and competent moral agent, should not have the capacity to agree to any fair arrange-

Appeal, 8 Barr, 199; *Reed v. Morrison*, 12 S. & R. 18; *Bullock v. Griffin*, 1 Strobb. Eq. 60; *Darnall v. Hill*, 12 Gill & J. 388.

¹ *Jones v. Powell*, 6 John. Ch. 194.

² In *Mundy v. Mundy*, 2 Ves. Jr. 122.

³ Ante, ch. vii.

ment which convenience or prudence dictated, by which her dower should be extinguished by an equivalent substitute in money or in land."

4. A similar decision was made in Kentucky. Lands were conveyed by the husband during coverture, his wife not joining. After his death, the widow received from his administrator, lands, slaves and money, equal in value to any interest that she was entitled to in the decedent's estate, under a parol agreement with the administrator that the property so received should be in full satisfaction of her right of dower, and of any other right that she had to the residue of the estate. The property received by the widow under this arrangement, was enjoyed by her as her exclusive and absolute estate for many years. It was held, that she was estopped in equity from claiming dower.¹

5. A testator devised an estate to his wife, but the will was silent as to whether the devise was intended to be in lieu of dower or not. She afterwards entered into an agreement in writing with the heir, reciting that she elected to take under the will, in lieu of dower, and agreeing to accept certain things in satisfaction of the devise. The heir performed the agreement on his part, and the widow enjoyed her rights thereunder until she contracted a second marriage. Upon proceedings for dower instituted by her and her second husband, the court held that she was barred.²

6. In *Simpson's Appeal*,³ the heirs entered into an arrangement with the purchaser of the estate in which dower was claimed, by which a substitute in money was provided for the dower interest of the widow. This arrangement was ratified by her and payment received under it. It was held, that she was estopped from contesting its validity, or claiming on inconsistent rights.

7. So if the wife join with her husband in a power of attorney, which is not acknowledged by her in the manner directed by law,

¹ *Warfield v. Castleman*, 5 Mon. 517.

² *Shotwell v. Sedam*, 3 Ohio, 5. Where a widow, who had formally waived the provisions of her husband's will, afterwards entered into a contract with the heirs and legatees that she would accept the provision made for her by the will, and make no other claim upon the estate, it was held, that this agreement could have no effect upon the action of the probate court in making the widow an allowance out of the personal estate. "A release to have any effect, must operate on an existing right. A widow's claim for an allowance is not such a right. It is merely in the discretion of the court." *Gowen, Appellant*, 32 Maine, 516, per Shepley, C. J.

³ *Simpson's Appeal*, 8 Barr, 199.

authorizing the sale of the husband's lands for the payment of his debts, and sales are made in the husband's lifetime, and after his death, she calls the attorney to account for the proceeds of the sale, and the surplus, after the payment of debts, is paid to her, or to her use, she is not entitled to dower.¹ "If," said Duncan, J., "the fact be so, that the surplus of the sale went to her use and support after her husband's death, with her knowledge, which is for a jury to decide, I think equity would interpose. It is as strong an equity as if she had stood by and seen the estate pass to an innocent purchaser;² and she would, as to him, be guilty of a fraud and concealment which would justify the interposition of a court of equity."

8. In a suit in equity for arrears of dower, the proof was, that after the sale of the husband's lands, and during the coverture, the wife took, by agreement with the purchaser, two negroes as an equivalent for her contingent right of dower, and retained possession of them without setting up any further claim, for seven or eight years after her discoverture. The court held that this continued possession and silent acquiescence for so long a time, might well be construed into a recognition and renewal of the agreement, and refused her application as inequitable.³

9. In *Hunter v. Jones*,⁴ it was held, that if a widow, who is also administratrix of an estate, appropriate the profits to the purchase of slaves, or other personal property, and afterwards she and her second husband agree to consider the property so purchased as part of the intestate's estate, (instead of accounting for the estate), and to take the property so purchased as part of her dower, or distributive share for life, such arrangement is binding on them, and on purchasers from them, so as to vest the title, after the death of the widow, in the distributee of the first husband, in like manner as if that particular property had belonged to the intestate in his lifetime.

10. But where the wife made advances to and for the use of the husband during the coverture, from moneys held by her as administratrix of her first husband's estate, and in consideration of these advances the husband conveyed a small tract of land, not exceeding in value the amount of the advances made, in trust for the wife, and the trustee afterwards conveyed the premises to her in

¹ *Reed v. Morrison*, 12 S. & R. 18.

³ *Bullock v. Griffin*, 1 Strobh. Eq. 60.

² *Post*, §§ 35-37.

⁴ *Hunter v. Jones*, 6 Rand. 541.

execution of the trust, this was held to constitute no equitable bar to her claim of dower. And the chancellor observed: "The conveyance of the eleven acres, even if voluntary, would have been no bar of dower, for it was never intended to be made, or accepted upon any such condition; but it appears to have been made upon a fair and valuable consideration."¹

11. A husband died seized of certain mill property and of a tract of wild lands. His widow acquired, by purchase, an estate in fee in an undivided moiety of the mill property, and entered into possession. A parol agreement was then made between her and the heirs that she should have the use of the other half of the mill property for life as an equivalent for her dower in the wild lands; and the heirs made partition of those lands among themselves without setting off any part for her dower. The chancellor refused to enforce this agreement against a plea of the Statute of Frauds set up by one of the heirs.² "There has been no part performance of that agreement," he said, "to take the case out of the statute. The partition of the wild land among the heirs did not affect her interest in the least. They had the right, and probably would have done the same thing if no agreement as to the dower had been made. Neither does it appear from this testimony that she took possession or has made any permanent repairs on the mill property under that agreement. She was already in possession as the absolute owner of one-half, and as tenant in dower of one-third of the residue. I do not understand that any change took place at the time of that agreement."

12. After a judgment recovered in dower, the demandant entered into an unsealed agreement with the grantor of the tenant, who had conveyed with covenants of warranty, by which the grantor bound himself to pay to her, in lieu of dower, twenty-five dollars a year during her life, and she agreed to accept of that sum annually in full of her claim. The grantor becoming insolvent, and the payments under the agreement being discontinued, the demandant prosecuted a writ of entry to recover the possession, and her action was sustained.³ Shepley, C. J., said: "The instrument amounts to an agreement on her part to forbear during life

¹ Swaine v. Perine, 5 John. Ch. 482, 490. To the same effect is Mitchell v. Mitchell, 8 Ala. 414.

² Squire v. Harder, 1 Paige, 494.

³ Sargent v. Roberts, 34 Maine, 135.

further to enforce her right to dower, upon condition that Bruce would pay to her annually twenty five dollars. The failure to perform that condition left her at liberty to avoid it."

13. A creditor levied his execution on land of his debtor, and, after the right to redeem had expired, sold the land with warranty for a sum exceeding the amount of his debt, and paid the balance to the widow and children of the debtor after his decease. It did not appear that the money paid was in lieu or in satisfaction of dower; nor was there any agreement not to claim dower. It was held that these facts furnished no bar in equity to the claim of the widow.¹

14. Articles of separation were entered into between husband and wife, by which the latter agreed to accept an annuity of two hundred and fifty dollars for life, in full satisfaction of her support and maintenance and of all right and claim of dower in her husband's estate. The husband failed to comply with these articles, and neglected to pay the annuity, or otherwise to provide for the maintenance of his wife. Upon bill filed by her against her husband for a divorce *à mensa et thoro*, she accepted a gross sum of eleven hundred dollars "in lieu of alimony and of all claims or charges whatever upon her husband, for her separate support and maintenance for ever." It was held, that as the articles of separation had been violated by the husband, and as the gross sum paid her was for alimony solely, she was not barred from claiming dower.²

15. In *Keeler v. Tatnell*,³ it was held that a plea in bar to an action at law for the recovery of dower, that the demandant had, by a parol agreement, accepted and received a sum of money in satisfaction of dower, is bad. The court added, that it was not necessary to determine how far a court of equity might decree a specific performance where there had been a parol accord and satisfaction and part performance.

By the acceptance of an estate inconsistent with the claim of dower.

16. It is a principle in the law of dower, that when the widow consents to an act inconsistent with her right to actual endowment, she is bound by her consent, and barred of her legal title. If, therefore, she agree to accept an interest in the dowable estate

¹ *O'Brien v. Elliot*, 15 Maine, 125.

² *Day v. West*, 2 Edw. Ch. 592.

³ *Keeler v. Tatnell*, 3 Zab. 62.

which is inconsistent with her title to dower in that estate, this acceptance will bar her of her legal right.¹

17. Thus, if she accept from the heir a lease for *life* of the whole of her husband's freehold estates, since she can not claim dower out of them without partially defeating such lease, she will be barred of her dower. "If a man seized of Blackacre in fee, take a wife and die, and the wife accept of a lease for life in Blackacre, she can not demand dower of the same acre; for if she demand it she must demand it against herself."² But it would seem that if her husband had died seized of one hundred acres, and the lease included fifty acres only, she might claim dower out of the remainder, provided she did not accept the demise in lieu of dower in the whole.³

18. Mr. Park says:⁴ "So where the widow accepts a chattel interest in the lands of which she is dowable, her right to be endowed is held to be *suspended* during the continuance of the chattel interest. As where, after the death of the husband, the widow accepts a lease for years of the husband's land from the heir, during this lease her dower is suspended."⁵ In response to a *quære* found in Perkins upon this point,⁶ Mr. Greening observes:⁷ "According to the case in Fitz. N. B. 149, E, and note, and Jenk. Cent. 73, pl. 38, the dower is suspended during the continuance of the lease; but as this is on the ground of inconsistency only, it is apprehended that at most it could be so held only where the husband died possessed of no other lands, and that generally the widow would recover her dower without reference to the term created by the lease. But the term, in the part assigned to her for her dower,

¹ 1 Roper, H. & W. 562. Where the wife of a debtor joins with him in the execution of a fraudulent conveyance of his real property to a third person, who reconveys to her, and the conveyances are set aside at the suit of a creditor, she is not entitled to have dower reserved to her by the judgment. *Meyer v. Mohr*, 19 Abb. Pr. R. 299.

² Perk. § 350. So, it is said, if the demandant in a writ of dower make an illegal entry into the land of which she claims dower, or into any part of it, she thereby abates her writ. *Kettlesby v. Kettlesby*, Dy. 76 b. But it seems that in *scire facias* to have execution of dower recovered, such an entry has been held no plea. *Ibid.*; Park, Dow. 214, note.

³ 1 Roper, H. & W. 562. See next section.

⁴ Park, Dow. 214.

⁵ Jenk. Cent. 2, ca. 38; Fitz. N. B. 149 (E); Gilb. Dow. 391. Mr. Roper's statement of the law on this subject is as follows: "So if the lease accepted were not for life, but for a term of years only, still it will exclude her from dower during the term, if it include the whole of the dowable estate." 1 Roper, H. & W. 562.

⁶ Perk. § 350.

⁷ Greening's note, Perk. § 350. And see Vin. Ab. Dower, X. pl. 20.

would of course merge in her estate for life; and the rent upon the lease, if any were reserved, be apportioned."

19. According to Perkins,¹ "If a man seized in fee of Whiteacre lease it to a feme sole for forty years, and the lessor intermarrieth with the lessee, and the husband suffer the term to continue as it was leased without any alienation or other thing done therewith, and die within the term, it is said that in this case the wife may have her dower presently, notwithstanding the term doth continue; because at the time of the lease she was not entitled to dower: and notwithstanding the term doth continue, it shall not oust her of her dower until the term be determined; because, if it [viz. her taking her dower] should be prejudicial to any person, it would be to the prejudice of the wife herself." In the case here put by Perkins, had the term been granted to a stranger, the widow would, as we have seen,² been entitled to dower of the reversion, with a *cessat executio* during the term. But her right is not affected by the term happening to be in herself; consequently, when the dower is assigned, and she becomes seized of an estate for life in a third part of the premises, the term for years in that part meeting with the estate for life merges in it. The widow, therefore, will hold that share in dower for her life, and the remaining two-thirds under the lease during the continuance of the term.³

20. As the husband can not prejudice his wife in respect to her freehold,⁴ a waiver of dower by a second husband will not bind the wife after his death. So if the heir, during the coverture with the second husband, make a lease for years to the wife of the land of which she is dowable, although the husband enter under the lease, she may, after his death, waive the lease and claim her dower.⁵ Neither can he prejudice her by accepting less than a third part for her dower, for, after his death, she may waive the portion which he accepted, and have her full third part.⁶

¹ Perk. § 351.

² Vol. i., ch. xviii., § 7.

³ 1 Roper, H. & W. 563; Park, Dow. 215; Fitz. N. B. 149 (E), n. But see Owen, 154, arg. in *Goodridge v. Warburton*, where it is said that if feme sole lessee marry the lessor, and the lessor die within the term, and the wife enter, this shall not conclude her dower after the lease is expired; and cites 11 Hen. IV. The fact of entry by the wife, is, however, not noticed in the case as put by Perkins. Park, Dow. 215, note.

⁴ See *Squire v. Harder*, 1 Paige, 494; post, § 31.

⁵ Jenk. Cent. 2, ca. 38; 1 Roper, H. & W. 562.

⁶ 4 Hen. V. 32, E. 1; Fitz. Dow. 121; Jenk. Cent. 2, ca. 56; Park, Dow. 216.

When the widow is estopped by her covenants.

21. In the Year Book 31 Edward I.,¹ (A.D. 1303), this case is reported: "A woman brought her writ of dower against a tenant, who vouched to warranty one John, son and heir of the husband, whose body, and a part of whose lands were in ward to the said woman; and a portion of the lands were in the ward of one Richard de Midd., and a portion in ward to the Earl of Leicester. The guardians came into court, and all yielded dower of their portions, except Richard de Midd.; and he warranted, and said that he had nothing except by lease from the same woman, who was guardian in socage of these tenements, and who had leased to him the tenements for the term of ten years; and he prayed judgment if in opposition to her own deed she could have an action during the term; and he showed a writing creating the term, &c.; and the woman was driven to answer, and she admitted it. Hengham adjudged, &c., that she do recover her seizin, saving to Richard his term. And she had a writ of seizin after the completion of the term."

22. And it seems to be well settled, that if the widow execute a conveyance of her husband's lands with covenants of warranty, she is estopped from afterwards asserting dower against parties claiming under such conveyance.²

23. Thus, where the widow, as administratrix upon her husband's estate, made sale of his lands under an order of court, and conveyed to the purchaser, with covenants for a good and perfect title, the court held, that although she was not bound to enter into such covenants, her act must nevertheless have its legal operation, and she was accordingly estopped from asserting dower in the lands sold.³ In a similar case in New York, where the purchaser had

¹ Year Books 30 and 31 Edw. I., by Horwood, 458.

² *Magee v. Mellon*, 23 Misso. 585; *Woodruff v. Cook*, 2 Edw. Ch. 259; *Dundas v. Hitchcock*, 12 How. U. S. 256. As to covenants made by the wife during coverture, see *Hill's Lessee v. West*, 8 Ohio, 226; *Massie v. Sebastian*, 4 Bibb, 436; *Fowler v. Shearer*, 7 Mass. 21; *Colcord v. Swan*, *Ibid.* 291; *Nash v. Spofford*, 10 Met. 192, holding that the wife is thereby estopped from setting up any after-acquired right; and *Jackson v. Vanderheyden*, 17 John. 167; *Dominick v. Michael*, 4 Sandf. S. C. 424; *Carpenter v. Schermerhorn*, 2 Barb. Ch. 314; *Martin v. Dwelly*, 6 Wend. 9, *contra*. See, also, *Wight v. Shaw*, 5 Cush. 65; *Wadleigh v. Glines*, 6 N. H. 18; *Den v. Demarest*, 1 Zab. 541; Va. Rev. Code, 1849, p. 514, ch. 99, § 7; *Nelson v. Harwood*, 3 Call, 342; *Rawle, Covenants for Title*, 2d ed. 429-30, 573-5; 2 *Smith's L. C.* 6th Amer. ed. 716.

³ *Magee v. Mellon*, 23 Misso. 585.

immediately re-conveyed to the administratrix, and the lands were afterwards sold on execution for her individual debt, the same doctrine was applied, although the sale by her was adjudged fraudulent and void as to the heirs.¹ So where a widow was allowed one year, after the probate of her husband's will, to elect whether to take under it or not, and by the will she was sole devisee for herself and children, and before the expiration of the year she released to a mortgagee of premises of which her husband died seized subject to the mortgage, all her estate, right, and claim therein, styling herself widow and sole devisee, it was held that she was estopped by her deed, from afterwards availing herself of her right of election and setting up a claim to dower outside of the will.²

24. But where there are no covenants for title, the general rule is, that the doctrine of estoppel does not apply. In a case involving this point, the widow, as administratrix, with her co-administrator, had conveyed lands in execution of the contract of her deceased husband, in pursuance of a decree ordering the conveyance to be made. The deed recited the seizin of the husband, the contract, the petition and decree, and conveyed the land, "and also all the estate, right, title, interest, &c., of the said James Smith, (the decedent), in his lifetime, and of them, the said Mary and Dale, (the widow and her co-administrator), since his decease, in law or equity,"³ and was sealed by the grantors, and signed without the addition of their official character. It was held that the dower of the widow did not pass.⁴ Gibson, C. J., said: "Had the dower been specifically described in it as a distinct estate and separate subject of the grant, an intention to convey it would have been too clearly disclosed to be resisted; but the administrators were directed by the decree to deal, not with their own property, but with the legal title of the vendor; and though a conveyance explicitly including an interest of their own would have passed it, yet the words in a conveyance like the present, are to be restrained, where they will bear it, to the business of the occasion, and no intendment is to be carried beyond it. The administrators met the defendant to execute

¹ *Woodruff v. Cook*, 2 Edw. Ch. 259.

² *Dundas v. Hitchcock*, 12 How. U. S. R. 256.

³ In *Thomas v. Harris*, 43 Pa. St. (7 Wright), 231, the court was again called upon to give a construction to this conveyance, and it was there held, that these words operated as a relinquishment of the dower of the widow.

⁴ *Shurtz v. Thomas*, 8 Barr, 359.

a contract, not of their own, but of their intestate; and before their particular interests are to be involved in their conveyance it must appear by special description that they were intended to be involved. No one can believe that the plaintiff meant to throw in her dower; and it would require strong terms to bear out an intention so opposite to her interest. By no construction but a strained one, could the clause in question be made to embrace any but joint interests of the administrators; and as it does not appear that they had any, it seems to have been inserted under a vague impression that the case was within the statutes which turn a devise of a power to sell into a devise of the legal title."

25. In Illinois, it is provided by statute, that no widow who shall, as executrix or administratrix, sell and convey, by order of court, for the payment of debts, real estate of her husband, in which she is by law entitled to dower, shall be deemed to relinquish her right to dower therein, by reason of such conveyance, unless her relinquishment shall be specified in such deed or conveyance.¹

26. And a deed by a guardian, conveying in specific terms, the interests of the minors, does not, it seems, transfer the right of dower of the guardian.²

27. In a case in Virginia, the real and personal property of an intestate, being undivided between his widow (who was also administratrix) and his only child, a daughter, and the marriage of the latter being about to be solemnized, a deed of settlement by the daughter and her intended husband was executed, conveying to trustees (of whom the mother was one) certain tracts of land by metes and bounds, and slaves by name, describing them as the property of the daughter; the same being in fact all the lands and slaves of which the intestate died seized and possessed. It was determined, that the mother's right to dower of the lands, and thirds of the personal estate of the intestate, were not relinquished by her being a party to this deed.³

28. It is of course competent for a widow who acts as trustee to convey her own interest in the same deed in which she executes the trust; and a conveyance so executed will bar her dower as effectually as if separate deeds had been made.⁴

29. Where real estate, the use and profits of which were devised

¹ 1 Stat. Ill. 1858, p. 156, § 34.

² *Jones v. Hollopeter*, 10 S. & R. 326.

³ *Wilcox v. Hubbard*, 4 Munf. 346.

⁴ *Thomas v. Harris*, 43 Pa. St. (7 Wright), 231.

to the widow of the testator for life, was sold by the widow and another person as trustees and executors under the will, and conveyance in fee was made by them, it was held, that although the widow would be estopped from claiming her life estate as against the vendee, yet that she might not be estopped from claiming against the distributees, who were to receive the proceeds of sale after the termination of her and another's life estates, her just share of the proceeds of the sale during her life, on proper security being given by her.¹

When the widow is estopped by the covenants of her ancestor.

30. A widow may also be precluded from claiming dower by the covenants of her ancestor. Thus, where the husband of the demandant acquired title from her father, the conveyance containing covenants of warranty binding the grantor and his heirs, it was held, that she was not entitled to dower against the alienee of her husband.² The chancellor, in support of his opinion that the widow should be enjoined from prosecuting her claim, said: "Ann Minor is barred of her dower right: 1. Because she is estopped by the covenant in the deed of her ancestor, Samuel Gibson, which is equally binding upon her as it was upon him. The covenant would be binding upon her to the extent of assets descended from her father, even if the title of the complainant was successfully assailed by a third person. 2. The covenant in the deed is her own covenant, and a court of equity will interpose to prevent a breach of covenant where irreparable damage would follow such breach, as would be the case here, since it is alleged that the defendant, Ann Minor, and all the other heirs of Samuel Gibson, are insolvent."

Extent to which the widow is affected by the covenants of her second husband.

31. In *Potter v. Potter*,³ a widow entitled to dower in the estate of her deceased husband, contracted a second marriage. The real

¹ *Styer's Appeal*, 21 Pa. St. (9 Harris), 86.

² *Torrey v. Minor*, 1 S. & M. Ch. 489. "Where, in a writ of dower against a guardian, the issue was whether the demandant was feme of the father of the heir, and it was found by verdict that she was not, it was held the heir should estop her by this verdict to claim her dower, though he was not wholly privy to it, because he should have been bound by it if this had been found against the guardian." *Park, Dow.* 297; *Roll. Abr. Estoppel*, (L.) pl. 11.

³ *Potter v. Potter*, 1 R. I. 43.

estate of the first husband was sold by his administrator for the payment of his debts. The purchaser conveyed the lands to the second husband, who afterwards sold and conveyed the same to the defendant, the wife not joining in the deed. It was held, that by the covenants of the husband, he and his wife were estopped from claiming dower in the estate during the existence of their intermarriage. "The husband, by the marriage," said the court, "gains a right to the possession and use of the estate—such an interest and title during the marriage, as enables him to control it. He has a freehold interest in her dower, determinable upon the dissolution of the marriage."¹

When widow not estopped by release.

32. A stranger to a release made by the wife, can derive no advantage from it; nor, as against him is she estopped from asserting dower.² But it has been held that if a married woman join with her second husband in a conveyance of real estate, and relinquish her dower therein, she is estopped to claim dower under her former husband in the lands so conveyed.³ And where the acknowledgment of a deed by a married woman was pronounced void by reason of its having been taken in one county by a justice of the peace of another county, but she afterwards joined as executor in a suit to recover the purchase-money for the lands conveyed by such deed, it was held, that she thereby affirmed the deed, and would be barred by the recovery from claiming dower.⁴

Effect of sale for taxes.

33. It is held in Ohio, that a right of dower, whether inchoate or perfect, is defeated by a valid sale and conveyance of lands for the non-payment of taxes.⁵

¹ See ante, § 20. The claim of a grantee against the heirs of a grantor, upon a covenant of warranty, is not a valid defence by way of counter-claim to a claim of dower by the widow of the grantor, under § 126 of the Kentucky Code of Practice. *Hill v. Golden*, 16 B. Mon. 551.

² *Littlefield v. Crocker*, 30 Maine, 192; *Harriman v. Gray*, 49 Me. 537; *Pixley v. Bennett*, 11 Mass. 298; *Robinson v. Bates*, 3 Met. 40; *Woodworth v. Paige*, 5 Ohio St. 70; *Blain v. Harrison*, 11 Ill. 384; *Summers v. Babb*, 13 Ill. 483. See post, ch. xii., §§ 40-42.

³ *Usher v. Richardson*, 29 Maine, 415.

⁴ *Share v. Anderson*, 7 S. & R. 42.

⁵ *Jones v. Devore*, 8 Ohio St. 430. See *Gwynne v. Niswanger*, 20 Ohio, 556; post, ch. xxxi., §§ 50-52.

What acts of the widow will estop her from claiming dower.

34. It is a point upon which the authorities are generally agreed, that if the dowress is guilty of fraudulent practices in inducing the purchaser to take the estate under a belief that she waives her right to dower, she will be estopped from afterwards setting up her claim.

35. In an early case in Pennsylvania, lands sold by the husband in his lifetime, were bid in by his executor, after his death, for the benefit of the estate, under a judgment recovered for the unpaid purchase-money. Afterwards, with the consent and approbation of the widow, who was a legatee under the will, the executor re-sold and conveyed the premises. No claim for dower was suggested by the widow during these transactions, but she afterwards brought an action of dower against the purchaser from the executor. Upon the trial, Yeates, J., said: "Mrs. Deshler is entitled to recover her dower in the premises, unless the peculiar circumstances of the case operate as a bar. The circumstances relied upon to produce that effect, are these: she made Neuhart her agent to buy the land at the sheriff's sale; and she approved of the purchase after it was made. She also knew and approved of the re-sale to the defendant, at a full price, and uncharged with dower; and until the defendant had paid the price, she never set up the present claim. The motives of Mrs. Deshler, in observing this silence, can not be positively ascertained; but she might think that if the lands sold high in consequence of appearing clear of every incumbrance, there would be the better prospect that her legacy of 1,000*l.* would be paid. Upon the whole, the jury will decide whether Mrs. Deshler's line of conduct held up to the public, and particularly to the parties, that she meant to waive the claim of dower. If it did, the verdict should be against her. If it did not, and the jury think that she always meant to assert her right of dower, then the verdict must be in her favor." The verdict was for the defendant.¹

36. So where real estate of a decedent was sold by an administrator and administratrix, under a surrogate's order, in which estate the administratrix was entitled to dower, and in the terms of sale it was stated that a clear and satisfactory title would be given, and the purchaser paid the full value of the premises, under a belief that he was obtaining a perfect title, it was held, that the silence of

¹ Deshler v. Beery, 4 Dall. 300.

the administratrix as to her claim of dower was such a fraud upon the purchaser as to preclude her from afterwards setting up such claim against him or his assigns.¹ In determining the case, the chancellor remarked as follows: "As the administratrix joined in the report of the sale to the surrogate, she must have been present at the sale, either personally, or by her agent; and must have seen the written terms of sale in which it was stated that the purchaser was to have a clear and satisfactory title. It was the brewery and the lot on which it stood, and not merely the decedent's interest therein, for which a clear and satisfactory title was to be given to the purchaser. And that necessarily excluded the idea that the purchaser was to take the property incumbered with a right of dower which had then become vested by the death of the husband. It therefore seems to be impossible that any of the parties could have supposed the purchaser was to take the property at its full value, and yet that the claim of dower was not to be relinquished. As the defendants must have known that Vassar was paying his money under a supposition that he was getting a perfect title, if Mrs. Topping did not intend to part with her dower, conscience required her to speak. And silence under such circumstances was such a fraud upon the purchaser as to prevent her from afterwards making her claim for dower in the premises."

37. In another case, a widow was present at a sale of her husband's lands by his administrator, and consented that the sale might be made free from her claim of dower. The purchaser, relying upon this promise, bid off the property at a much larger sum than he would have otherwise paid. A bill for dower afterwards brought by the widow was dismissed.² The court, in disposing of the case, said: "It is a well established principle in equity, that if a person, having a right to an estate, permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right;³ and the rule prevails even against *feme covert*s, and persons under age.⁴ It is contended on the part of the complainants, that the acts and declarations of Mrs. Smiley, at the time of the sale of the lots in question, ought not to bar her of the aid of a court of equity, because she was at that time ignorant of

¹ *Dougrey v. Topping*, 4 Paige, 94.

² *Smiley v. Wright*, 2 Ohio, 506.

³ *Daniels v. Davison*, 16 Ves. Jr. 253; *Evans v. Bicknell*, 6 Ves. Jr. 174; *Livingston v. Byrne*, 11 John. 564; *Stoires v. Barker*, 6 John. Ch. 166; 9 Mod. 35.

⁴ *Cory v. Girchin*, 2 Mad. 40.

her rights, nor can they be considered as a fraud upon the purchaser, as he had notice of her title. It is unnecessary to consider whether a person, having legal title to lands, who encourages the sale by another, shall be permitted to show his ignorance of that title, to the prejudice of a *bonâ fide* purchaser for a valuable consideration, as we are clearly of the opinion that the evidence does not prove Mrs. Smiley's ignorance of her rights at the time of the sale by the administrator. . . . If she had not, in fact, relinquished her right of dower, her standing by, permitting the property to be sold free of dower without asserting her claim, was calculated to deceive and defraud the purchaser,¹ and did induce him to pay a much larger sum for the property than he would otherwise have given. He believed she had relinquished her dower, and acted upon this belief. To permit her to assert her title to dower, against a *bonâ fide* purchaser for a valuable consideration, who was induced by her to purchase, because she has never executed any formal act of assignment, or release of her dower, would be to aid her in the commission of fraud."

38. A like decision was made, upon a somewhat similar state of facts, in *Ellis v. Diddy*.² In that case, which was a proceeding for dower, the defendant pleaded in bar that the guardian of the heirs of the deceased husband, obtained an order for the sale of the lands in which dower was claimed; that the widow was present in court, and concurred in the application for the order; and that the premises were sold to the defendant, the widow receiving a portion of the purchase-money in payment of her right of dower. He further averred that the widow was present at the sale, and heard the commissioner represent that the purchaser would receive a title free from all claims, and concurred therein, and gave no notice of any claim upon the estate. It was held, that if the matters so alleged were true, the petitioner was estopped from asserting a right of dower.

39. So where a bill was filed by the creditors of a testator against his executrix, who was also his widow, praying that the real estate of the testator might be sold to pay his debts; and a decree was made and the lands sold in conformity to the prayer of the bill, the widow making no claim of dower, it was held, that she was

¹ See *Heth v. Cocke*, 1 Rand. 344.

² *Ellis v. Diddy*, 1 Carter (Ind.), 561; s. c. 1 Smith (Ind.), 354. See, also, *Gatling v. Rodman*, 6 Ind. 289.

barred from afterwards setting up dower against the purchaser.¹ "The claim of dower," said the court, "is much favored, but it can not be permitted to ride over the well settled rules of law. . . . Like all other rights, it may be waived, if the party claiming neglects to maintain or assert it when an opportunity occurs, and the occasion requires that it should be asserted. . . . The bill filed by Tennant against the complainant and others, prayed expressly that the estates, real and personal, might be sold to pay debts. The complainant then had an opportunity of asserting her right to dower, and having neglected it, she is concluded by the rule. It is but just to the purchaser, who might, and would reasonably conclude, that the rights of all the parties to the proceeding under which the sale had been made, had been adjusted." But where a sale has been made on a bill to marshal assets, the widow may come in before distribution of the funds and claim the value of her dower out of the proceeds of the sale.²

40. A testator, by his will, authorized his executors to sell his real estate, and in case they did so, the will gave the widow the use of one-third of the proceeds of such sale. The executors made the sale, and the widow accepted and enjoyed the use of the proceeds for a number of years. It was held, that she was estopped from setting up any claim to dower in the premises, in the hands of an innocent grantee, who was permitted to receive the title in her presence, with the assurance that her claim to dower was extinguished. And it was laid down as the general rule applicable to such cases, that where the widow knowingly permits the purchaser to part with his money for real estate, under the assurance that the land is free from her claim of dower, and accepts and enjoys the use of the purchase-money, such acts on her part constitute an *estoppel in pais*. If, under such circumstances, she institute proceedings to obtain an admeasurement of dower, and threaten to bring ejectment to recover the same, an action may be maintained against her for a perpetual injunction. Such proceedings on her part constitute a cloud upon the title to the land, and justify an action to quiet the title.³

41. In a case in Kentucky, the court were in doubt whether a

¹ *Stoney v. Bk of Charleston*, 1 Rich. Eq. 275. See *Darnall v. Hill*, 12 Gill & J. 388.

² *Tennant v. Stoney*, 1 Rich. Eq. 222.

³ *Wood v. Seely*, 32 N. Y. (5 Tiffany), 105.

claim to dower should be disallowed in equity by reason of a parol promise by the widow to a purchaser under a decree against her husband, that she would relinquish her claim.¹ "It may be a serious question," the court remarked, "whether, if Mrs. Moore had authorized the annunciation made at the decretal sale, that she would relinquish her dower to the purchaser, with the intention and effect of enhancing the price of the land, this circumstance should not induce a court of equity to refuse its aid in enforcing her claim, and to turn her round to her legal remedy. We are relieved, however, from the decision of this question in the present case, because the fact of previous authority is not established."

42. Where the widow has done nothing to mislead the purchaser, and the circumstances are such that she is not required by good faith to disclose her claim, her mere silence in regard to it does not affect her right. Thus, her failure to give notice of her claim when the land in which she has dower is advertised for sale, is no bar to her recovery.² So, where lands are sold by a commissioner, under an order of court, obtained by the widow as administratrix, but nothing is said or done to induce the belief that she will waive her dower, a simple omission on her part to announce at the sale that the land will be sold subject to her dower, will not estop her from asserting that right.³ In *Lawrence v. Brown*,⁴ where this subject is quite fully discussed, the court say, that in order to constitute an *estoppel in pais*, not only must the widow, by her words or conduct, have caused the purchaser to believe that he would acquire a title discharged from dower, but he must also have acted upon that belief in making his purchase and paying the purchase-money.

43. In *Hill v. Hill*,⁵ it is said, that a widow may claim her dower, "unless by her own laches she has abandoned or waived the right." And in *Edmondson v. Montague*,⁶ that she is not estopped by her acts and omissions, "except in cases where, in good conscience and honest dealing, she should not be permitted to gainsay them." In *Martin v. Martin*,⁷ it is decided that a dowress is not estopped from

¹ *Moore v. Tisdale*, 5 B. Mon. 352, 358.

² *Smith v. Paysenger*, 2 Mills, (Con. Court), 59.

³ *Owen v. Slatter*, 26 Ala. 547.

⁴ *Lawrence v. Brown*, 1 Seld. 394, 401; post, § 46.

⁵ *Hill v. Hill*, 5 Ark. 608.

⁶ *Edmondson v. Montague*, 14 Ala. 370.

⁷ *Martin v. Martin*, 22 Ala. 86.

asserting her claim, "by any recognition on her part, after a voluntary separation from her husband, of his right to marry another woman, or of the validity of his supposed second marriage."

44. In a case in North Carolina, a testator, by his will, had directed his executors to allot fifty acres of land to his widow in lieu of dower; under a power in the will, the executors advertised the residue of the land for sale, but understanding that the widow intended to claim her dower, they agreed with her to give her a horse and one year's provisions, and to build her a house, upon condition of her abiding by the will. After the widow had acceded to these terms, the land was exposed to sale, subject to the life estate of the widow in fifty acres only. The executors failing to comply with their agreement, it was held, that the widow was entitled to recover her dower against a purchaser with notice of her rights.¹ "If indeed it had been proclaimed," said the court, "in order to enhance the price, that the widow had consented to forego her claim to dower, then as those promises were the cause of such consent, they ought to have fulfilled them. But it appears that nothing was said about the widow's dower. The defendants sold, and the plaintiff bought, subject to that claim."

45. A widow entitled to a moiety of a tract of land as devisee under her husband's will, and who has procured partition to be made, is not estopped by the partition from prosecuting her action of dower against the parties holding the other moiety.² So, where, at the time of the partition of an estate among co-devisees, one of them had an inchoate right of dower in premises set off by the partition to another; and subsequently to the partition, the inchoate right of dower became perfect by the death of her husband, she will not in equity be held estopped to claim her dower against her co-partitioners.³ But in such case, equity will, while sustaining the claim to dower, decree and enforce a contribution by all the parties to the partition, to make good to the co-devisees, in whose share the dower is assigned, their equal share in the common estate remaining after the assignment of dower.⁴

46. Where dower has been assigned by the court of chancery, and afterwards the estate of the husband, including the part assigned for dower, is sold for the payment of debts under an order of the

¹ *Wilson v. White*, 2 Dev. Eq. 29.

³ *Walker v. Hall*, 15 Ohio St. 355.

² *Kennedy v. Nedrow*, 1 Dall. 415.

⁴ *Ibid.*

surrogate, such order, so far as relates to the life estate of the widow, is void; and the receipt by her, as assignee of the creditors, of the entire proceeds of the sale, can not be regarded as an affirmation by her of the sale of her life estate, nor as a surrender thereof to the purchaser.¹ The money in such case is not received by the widow "as an equivalent for, or in satisfaction of her estate in dower, but expressly in her character of creditor of the estate of her husband." But where land of which a husband died seized, is decreed by a court of equity to be sold free from dower, for the payment of debts, and the widow is a party to such proceeding, she is barred from claiming dower so long as the decree remains unreversed.²

47. It is no answer to a proceeding for dower, that the widow has disposed of her husband's whole personal estate, exceeding in amount the value of her dower interest;³ nor that she has wasted it or converted it to her own use.⁴ Nor will the fact that the defendant is a creditor make any difference as to the right of the widow to recover.⁵

Election to take statutory provision in lieu of dower.

48. Section one of the South Carolina statute of distributions of 1791,⁶ gives to the widow one-third of the realty in fee, in case a child or other lineal descendant is left; and one moiety if no child or other lineal descendant survive. In section two it is provided "that in all cases of intestacy, the personal estate of the intestate shall be distributed in the same manner as real estates are disposed of by this act." Section six enacts "that in all cases where provision is made by this act for the widow of a person dying intestate, the same shall, if accepted, be considered in lieu of and in bar of dower." The widow, by accepting her "thirds" under the first section of this act, or a distributive share of the personalty under the second section, is, in either case, barred at law and in equity, of her dower, as well in the lands which her husband conveyed during the coverture, as in those of which he died seized.⁷

¹ *Lawrence v. Brown*, 1 Seld. 394.

² *Gardiner v. Miles*, 5 Gill, 94.

³ *Caruthers v. Wilson*, 1 S. & M. 527.

⁴ *Kennedy v. McAliley*, 9 Rich. L. 395.

⁵ *Ibid.*

⁶ 5 Stat. S. C. 162. See 1 Brev. Dig. tit. 101; 2 *Ibid.* p. 350, § 24.

⁷ *Avant v. Robertson*, 2 McMullan, 215; *Buist v. Dawes*, 3 Rich. Eq. 281; *Evans v. Pierson*, 9 Rich. L. 9; *Floyd v. Hodge*, 10 Rich. L. 157.

49. The election of the widow to take under the statute need not be formally made, but may be inferred from circumstances. Thus, where she is found purchasing a portion of the real estate of her deceased husband, joining with the heirs in the conveyance of other portions, and receiving a part of the purchase-money, these are circumstances from which an election on her part may be presumed.¹ But where, at a sale of the personal property of an intestate, his widow and her second husband purchased to a small amount, and gave the administrator a receipt for that amount on her distributive share; and the debts exceeded the personal assets, and were afterwards paid by a sale of the lands; it was held that the widow was not barred of her dower, the personalty being the primary fund for the payment of debts, and there being no personal estate to distribute.²

50. The courts will not suffer an election once made to be retracted, except upon grounds of equity clearly made out. Thus, where the husband died intestate, possessed of an inconsiderable estate, but having a contingent interest in property of great value; and the widow received a sum of money in lieu of her dower; and after her death, and the lapse of a number of years, the contingent interest of the husband became vested, her representatives were not permitted to retract the election made by her and avail themselves of her supposed right of dower in the augmented estate, even though they offered to make compensation for the money actually received by her.³ So, where a widow claimed her dower, and had it set off to her by legal process, and enjoyed it for several years, she was concluded, although the estate was not entirely settled, from afterwards setting aside her proceedings and demanding a third in fee under the statute.⁴

51. To entitle a widow to dower under the first section of the dower act of Missouri,⁵ it is not necessary that she should elect so to take. No election to take under the first section, can, as an election, impair her right to be endowed under the eleventh section.⁶

¹ *Avant v. Robertson*, 2 McMullan, 215. ² *Floyd v. Hodge*, 10 Rich. L. 157.

³ *Buist v. Dawes*, 3 Rich. Eq. 281.

⁴ *Quarles v. Garrett*, 4 Desaus. 145.

⁵ 1 R. C. Misso. 1855, ch. 56, § 1. This section gives dower in the lands of which the husband, or any person to his use, was seized during the coverture; and also in leasehold estates.

⁶ By this section, when the husband shall die, leaving a child or children, or other descendants, the widow may, in lieu of dower as provided by section one, elect to

To prevent her from exercising this right, there must be a binding contract, or such facts and circumstances as will work an *estoppel in pais*.¹ The institution of a suit to recover dower according to the first section, and the declaration in the petition, signed and sworn to by the widow, that she thereby elects to take as her dower the third part of the lands of her deceased husband, will not affect her right to elect, within eighteen months after the grant of letters upon his estate, to take dower under the eleventh section of the act.² If the widow elect to take personalty under the statute,³ in lieu of her dower, she can not insist upon a sale of the realty for the payment of debts, in exoneration of the personal estate.⁴ So where she elects to take "one-half of the real and personal estate belonging to the (her) husband at the time of his death, absolutely,"⁵ she can take no interest in the property aliened by her husband in his lifetime.⁶ In the case of *Hornsey v. Casey*,⁷ a doubt was expressed as to whether an election to take under the third section⁸ will operate as a bar to dower under the first section. The right of the widow to elect under this statute, is strictly personal, and not transmissible by descent.⁹

52. It is held, under the Georgia statute, that the proper mode for the widow to signify her election to take a child's part, instead of dower,¹⁰ in the real estate of her deceased husband, is to file a written declaration to that effect in the court of ordinary where administration has been granted upon his estate.¹¹

53. In Pennsylvania, the acceptance by the widow of her share of her deceased husband's intestate estate, under the statute of distributions, will not bar her from recovering dower out of land which her husband had aliened in his lifetime.¹²

be endowed absolutely in a share of such lands, equal to the share of a child of such deceased husband. The provisions of this section are made subject to the payment of the husband's debts. 1 Rev. Code Misso. 1855, ch. 56, § 11. The statute of Kansas is similar to that of Missouri. Comp. Laws Kansas, 1862, ch. 83.

¹ *Watson v. Watson*, 28 Misso. 300. See *Hamilton v. O'Neil*, 9 Misso. 11; *Kemp v. Holland*, 10 Misso. 255; *Hornsey v. Casey*, 21 Misso. 545.

² *Watson v. Watson*, 28 Misso. 300. ³ See 1 R. C. Misso. 1855, ch. 56, § 4.

⁴ *Chinn v. Stout*, 10 Misso. 709. ⁵ 1 R. C. Misso. 1855, ch. 56, §§ 5, 7.

⁶ *Hornsey v. Casey*, 21 Misso. 545. See *Welch v. Anderson*, 28 Misso. 293.

⁷ *Hornsey v. Casey*, *supra*. See *Hamilton v. O'Neil*, 9 Misso. 11.

⁸ Sect. 5 in the revision of 1855. ⁹ *Welch v. Anderson*, 28 Misso. 293.

¹⁰ See vol. i., ch. ii., § 17; *Cobb's New Dig.* p. 228.

¹¹ *Royston v. Royston*, 21 Geo. 161.

¹² *Leinawever v. Stoeve*, 1 Watts & Serg. 160. See vol. i., ch. xx., §§ 18-20; ch. xxix., §§ 36-39.

54. In Massachusetts, if the husband die intestate without issue, his widow may take one-half of his lands during her lifetime; and, if she take under this section, may clear wild lands.¹ Or she may, at her election, take dower in his estate instead of the benefit of this provision.²

55. In Vermont, where the husband dies leaving no children or representatives of children, the widow is entitled to one-half of his estate; and in this case she is barred of her dower, unless within eight months after the will of her husband has been proved or letters of administration have been granted on his estate, she shall elect to take her dower in lieu of the provision so made for her by law.³

Decree in foreclosure upon mortgage not executed by the wife.

56. It is settled by the authorities that a person claiming adversely to the mortgagor, and by title prior to the mortgage, can not be made a party defendant to a bill in foreclosure for the purpose of trying his title.⁴ And it has been held, that the widow of a mortgagor, whose right of dower is paramount to the mortgage, is so far an adverse claimant by prior title as to come within the operation of this rule.⁵

¹ Gen. Stat. Mass., p. 470, ch. 90, § 15.

² Ibid. § 16.

³ Gen. Stat. Verm., ch. 55, §§ 5, 6.

⁴ *Holcomb v. Holcomb*, 2 Barb. 20; *Eagle Fire Co. v. Lent*, 6 Paige, 635; *Lyman v. Little*, 15 Verm. 576; *Jones v. St. John*, 4 Sandf. Ch. 208; *Corning v. Smith*, 2 Seld. 82; 2 *Hilliard on Mortgages*, 2d ed., ch. 32, § 84.

⁵ *Lewis v. Smith*, 11 Barb. 152; s. c. 5 Seld. 502. In the first volume of this work, reference is made to authorities upon the question whether the wife is a necessary party to proceedings in foreclosure in the lifetime of her husband. Vol. i., ch. xxiii, §§ 31-34. Since the publication of that volume this question has been before the Supreme Court of Ohio, and it was determined, after full consideration of the subject, that a foreclosure during the lifetime of the husband, by suit to which the wife is not a party, does not bar her equity of redemption, although process is issued against and served upon the husband. *McArthur v. Franklin*, 15 Ohio St. 485; s. c. 16 Ohio St. In this case the mortgage was given to secure an indebtedness of the husband, and was executed by the husband and wife during the coverture. The court left undetermined the question as to the effect of a foreclosure in the lifetime of the husband without making the wife a party where the mortgage was executed by the husband before the marriage, or was given to the vendor to secure the purchase-money, or was an incumbrance existing on the lands at the time the title was acquired. Similar rulings have also been made in Illinois. *Gilbert v. Maygard*, 1 Scam. 471; *Leonard v. Villars*, 23 Ill. 379. In the case last cited a decree in foreclosure was reversed because the wife was not a party to the proceeding, the court being clearly of the opinion that she was a necessary party, and that her right to redeem after her husband's death would not be barred unless

57. In the case last referred to, however, the bill in foreclosure was not so framed as to present any question upon the claim of dower. The facts were as follows: A. in 1826, gave a mortgage

she was joined. But in a subsequent case, it was held that this doctrine does not apply where the mortgage was given for the purchase-money of the land, and that in such a case it is not necessary to make the wife a party. *Stephens v. Bichnell*, 27 Ill. 444. In Missouri, it is held that the wife need not be made a party to a proceeding under the statute to foreclose a mortgage although she may have joined with her husband in its execution. *Reddick v. Walsh*, 15 Misso. 538; *Thornton v. Pigg*, 24 Misso. 249. See, also, *Mims v. Mims*, 1 Humph. (Tenn.) 425. In *Carter v. Walker*, 2 Ohio St. 339, the husband had alone mortgaged his estate; subsequently the husband and wife joined in a conveyance of the premises mortgaged. It was held that the wife was not a necessary party to proceedings in foreclosure afterwards instituted upon the mortgage, as she had fully relinquished her right to the grantee of her husband. In New York, if a mortgage executed by the husband before marriage, has been foreclosed after marriage, without making the wife a party, her remedy, after the death of her husband, if she have any, is by bill in equity to redeem. *Smith v. Gardner*, 42 Barb. 356.

In *McArthur v. Franklin*, 16 Ohio St. R., the court affirmed the doctrine of the same case, 15 Ohio St. R. 485, cited above, and decided the following additional propositions:

"The purchaser at a sale in proceedings to foreclose against the husband alone, acquires the interests both of the husband and the mortgagee. As against the widow the position of such purchaser is the same as if he derived title under a sale on execution, except that he also acquires the interest of the mortgagee. But when the mortgage debt is paid, his interest as mortgagee ceases, and the widow is entitled to have her dower assigned in the land.

"The purchaser, having acquired, and entered into possession under the title of both the mortgagor and mortgagee, is to be regarded as the mortgagor and mortgagee occupying the mortgaged premises in common, according to their respective interests. And, regarding the price paid at the judicial sale, as representing both interests, the purchaser should account for such a proportion of the net annual rents as the amount due on the mortgage at the time of the sale bears to the price at which the land was sold.

"In ascertaining the annual rents, the enhanced value of the land from improvements other than ordinary repairs should be excluded. Taxes and ordinary repairs should be deducted in ascertaining the net rents.

"The plaintiff not having been a party to the foreclosure suit, is entitled to have the account taken in the same manner as if no decree had been rendered. Therefore, in ascertaining the amount due on the mortgage debt, there should be no rest made at the time of the rendition of the decree.

"With the consent of the defendant, the plaintiff may redeem her dower by paying her proportion of the mortgage debt. This would be such part of one-third of the debt remaining unpaid as bears the same proportion to the third part of such debt as the value of her life estate in one-third part of the land bears to the value of the unincumbered fee in the third last named.

"The value of the widow's life estate in such case is the present worth of an annuity for her life, equal to one-third of the interest of the mortgage debt unpaid."

upon his real estate, in which his wife did not join. He had previously contracted to sell to the defendant, and others, various parcels of the lands, and the contracts were included in the mortgage and assigned to the mortgagee, with the moneys due and to become due thereon. A. died in 1830, leaving a will, in which he made a provision for his wife, the plaintiff, not expressed to be in lieu of dower, and appointed her executrix, and several others executors. After the testator's death, the assignee of the mortgage, and several of the persons holding contracts of purchase, one of whom was the defendant, united and filed a bill in chancery against the widow and the devisees under the will, one of whom was the executor that had qualified, and served on the defendants in that suit a notice stating that the object of the suit was to foreclose the mortgage, and that they made no personal claim against the defendants; and in the bill filed by them they set forth the rights of the defendants under the will, and that the widow and one of the defendants had qualified as executrix and executor, and then set forth generally that the said defendants had, or claimed to have, some interest in the premises "as *subsequent* purchasers, incumbrancers, or otherwise," but made no mention of the widow's claiming dower nor any allegation in reference thereto. The defendants suffered the bill to be taken as confessed. A decree was made ordering a sale, and that the purchaser be let into possession. The assignee of the mortgage became the purchaser under the decree, and received a master's deed. The widow brought ejectment to recover dower in the mortgaged premises, and it was held that her dower right was paramount to the mortgage, and the title acquired by the purchaser subject thereto; that the bill was not properly framed to enable the complainants therein to litigate her claim to dower in that suit; that, as there was no allegation in the bill relative to her claiming dower, or that the devise under the will was in lieu of her dower, she was not a party to that suit as dowress, but only as executrix and devisee; and that her claim to dower being paramount to the mortgage was not the subject of litigation in that suit; and that, as to that claim, she would not have been a proper party to the suit.¹

58. In disposing of the case in the court of appeals, Denio, J., said: "It is conceded by the defendant's counsel that a foreclosure

¹ Lewis v. Smith, 11 Barb. 152.

suit is not an appropriate proceeding in which to litigate the rights of a party claiming title to the mortgaged premises in hostility to the mortgagor. This court has recently determined that where a party setting up such a claim is made a defendant in a bill to foreclose a mortgage, the decree will be held erroneous and will be reversed, though made after a hearing upon the pleadings and proofs.¹ But all claimants whose title is derived from the mortgagor subsequent to the mortgage are not only proper but necessary parties. It follows that a party claiming dower by a title paramount to the mortgage can not be brought into court in such a suit to contest the validity of her dower; but if she signed the mortgage, or if it was executed prior to the marriage, she must, like any other party having a claim upon the equity of redemption be made a party to the bill of foreclosure. The plaintiff was married to the mortgagor long before the execution of the mortgage, and she did not join in it. But it is argued that the owner of the mortgage had a right to allege that her title was not paramount, but subject to the mortgage; that she was married after it was executed, or signed, or acknowledged it, or the like; that the bill which was filed against her, properly construed, in connection with the rule of the court on the subject of foreclosure bills, does so allege in effect; and as she has suffered it to be taken as confessed, the decree and the sale made under it has extinguished her title. . . . In the special case of a title to mortgaged premises, and a *bonâ fide* controversy as to priority between it and the mortgage, the complainant in the foreclosure bill must state the facts upon which the question arises, as he insists they exist, according to the rules of equity pleading. . . . If he omit to do this, it will be under the pain of being obliged to show, when the decree is relied upon collaterally, that the title alleged to be foreclosed was in fact subordinate to the mortgage. . . . It is not intended to decide that if a party claiming a title prior to the mortgage should be made a defendant, and should answer and litigate the question, and should have a decree against him, it would not conclude him in a collateral action. In this case the title of the present plaintiff as dowress is not alluded to in the bill. She is only spoken of as the wife of the mortgagor incidentally, in repeating the language of the will, where the testator, calling her his wife, bequeaths to her his pro-

¹ Corning v. Smith, 2 Seld. 82.

party, and makes her his executrix. As a devisee of the mortgaged premises and an executrix of the mortgagor, the plaintiff was a necessary party to the bill; but in her character of his widow, entitled to dower by virtue of her coverture before the mortgage was given, she had nothing to do with the foreclosure. Having no defence to make as to her interest as devisee of the equity of redemption, and being unable to resist the claim to a decree against her for any ultimate deficiency, she had no motive for answering the bill. It made no claim and prayed for no relief which she could defend against. She therefore lost nothing in suffering it to be taken as confessed, and it presents no impediment to the recovery of her dower."¹

59. In the foregoing case, it was not claimed that the mortgage had priority over the right of dower; but that the widow was barred generally of her dower in all the estate of her husband, by reason of devises contained in his will, which devises, it was insisted, were in lieu of dower. The court determined that a question of this nature could not properly be litigated in a suit in foreclosure founded upon a mortgage in no way affecting the interest of the wife; and that, in cases where she is properly made a party, it is necessary, in order to conclude her, to set forth with reasonable certainty, the grounds upon which priority is claimed over her right. Instances in which she should be joined as a defendant are mentioned in the opinion quoted above; as where the mortgage was executed before the marriage; or where she has joined in its execution after the marriage. Other cases might be enumerated; as where the mortgage was executed by the husband alone for the purchase-money of the mortgaged premises;² or where the vendor has relied upon his lien and no mortgage was taken;³ or where lands have been acquired for partnership uses and a mortgage thereon executed by the partners to secure a partnership debt;⁴ in all cases of this character, the right of dower attaches, or subsists,

¹ *Lewis v. Smith*, 5 Seld. 502. See *Mims v. Mims*, 1 Humph. 425; *Denniston v. Potts*, 11 Smedes & Marsh. 36.

² Vol. i., ch. xii., §§ 39-45.

³ Vol. i., ch. xx., § 44; ch. xxv.

⁴ Vol. i., ch. xxvi. And where a bill is filed by surviving partners, alleging insolvency of the firm, and praying an account and a sale of the real estate of the partnership for the payment of debts, the widow of a deceased partner should be made a party; otherwise she will not be bound by the decree, and may show that the firm was in fact solvent, and so entitle herself to dower against the purchaser. *Collins v. Warren*, 29 Misso. 236.

subject to the mortgage, or the lien of the vendor; and for this reason, upon the principle laid down by the court above, the widow is a necessary or proper party to a proceeding founded on the incumbrance; and if the bill be properly framed, so as to present the facts upon which the rights of the respective parties rest, she will be concluded by the decree, and the purchaser will take the title discharged from her claim of dower.¹

60. Where a vendee mortgages land to secure the purchase-money, and a sale is afterwards had under proceedings in foreclosure, his widow claiming dower is estopped by the record from denying the validity of the mortgage.²

¹ Vol. i., ch. xxiii., §§ 24-34; ch. xxv., § 4; ch. xxvi.

² *Pledger v. Ellerbee*, 6 Rich. L. 266.

CHAPTER XII.

RELEASE OF DOWER.

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Dower not releasable by parol.

1. As dower is an interest in lands, a valid release of that interest can only be made, under the Statute of Frauds, by an instrument in writing. No mere parol relinquishment, however formal, will operate to divest the right.¹

Release by fine and recovery in England.

2. It was for a long time doubted by eminent English lawyers, whether, before the death of the husband, there were any means

¹ *White v. White*, 1 Harrison, 202; *Keeler v. Tatnell*, 3 Zab. 62; *Lothrop v. Foster*, 51 Me. 367; *Worthington v. Middleton*, 6 Dana, 300. See post, § 23. An agreement to release such right can not be proved by parol. *Lothrop v. Foster*, *supra*. In Indiana, the widow of a deceased vendee may release to the vendor, by parol, her dower in her husband's equity. *Malin v. Coult*, 4 Ind. 535. But in Virginia, the same formalities are required for the relinquishment of dower in equitable, as in legal estates. *Countz v. Geiger*, 1 Call, 190. The right of dower may be barred by an award of arbitrators under a submission to which the widow was a party. See ante, ch. ii., § 42. On an issue involving the validity of a release of dower, in which an insufficient consideration is alleged as evidence of invalidity, the value of the estate is material. *Parks v. Dunkle*, 3 Watts & S. 291. In Vermont, the wife does not, by joining her husband in a conveyance of the homestead, affect her right to dower

by which the wife's inchoate title of dower could be voluntarily extinguished.¹ It was thought that as she had no right of action until the death of her husband, she had nothing to part with until then, and could not be bound, even by fine.² But eventually it became established, that the title of dower, although inchoate until the death of the husband, yet being an interest attached on the lands from the instant of the concurrence of marriage and seizin, might be extinguished by those modes by which a married woman was permitted to relinquish any other legal interest in real estate.³ We are told that so long ago as the time of Lord Coke, "no question was made but that if the husband and wife levy a fine, the wife is barred of her dower, for the intermarriage and seizin are the fundamental causes of dower, and the death of the husband but as an execution thereof."⁴ In commenting upon the ninth section of the Fines and Recoveries Act, Sir E. Sugden, observes: "In framing this section the right of dower is not scientifically provided for, but the intention is obvious, and the married woman is empowered to extinguish any estate which she has in the lands, and the word 'estate' is, by the first section, extended to any interest in lands, and a power does appear therefore to be given to married women and their husbands to bar dower."⁵

3. If an action were brought against husband and wife for the recovery of lands wherein the wife had any estate, and judgment was given against them, the wife was barred;⁶ and at an early period it seems to have been admitted, that a recovery against husband and wife of the husband's lands, should bar the wife's dower.⁷ And a fine being an accommodation of a suit, and a concord being deemed to have the same force and effect as a judgment in a real action, it follows, that a married woman must have been as effectually bound by a fine, as by a judgment in an adversary suit.⁸

in lands of which he died seized. Gen. Stat. Verm. p. 457, § 11. As to the circumstances under which a widow will be estopped in equity from claiming dower, see ante, ch. xi.

¹ There are two instances in Madox's *Formulare Anglicanum*, (No. 148, 319,) of feoffments which are expressed to be made with the assent of the feoffor's wife. And Mr. Reeves, (*Hist. Eng. Law*, vol. i., p. 91), supposes that the wife's claim of dower might in those days be barred by such assent, because feoffments were then made publicly in court. See Butl. Co. Litt. 330 b., n. 1; Park, Dow. 191, note.

² See Lampet's case, 10 Co. 49.

³ Park, Dow. 192.

⁴ Lampet's case, 10 Co. 49 b.

⁵ 2 Sugd. V. & P. 11th ed. 600.

⁶ 2 Inst. 342.

⁷ Plowd. 514; Shep. Touch. 46.

⁸ See Hargr. Co. Litt. 121 a, n. 1.

4. Prior to the recent statutory changes in England,¹ it was the common practice for the husband and wife to come in as vouchees; and it was almost universally admitted, that the voucher of the wife would extinguish her right of dower. A fine was uniformly used for the purpose of barring dower except in cases where a recovery was necessary to discharge the title from an existing estate tail.²

5. If the uses of a fine or recovery had been declared by the husband alone before it was levied or suffered, and he and his wife had joined in the fine or recovery, her dower was extinct; for that was the necessary consequence of her concurring in those acts, and the revival of her right to dower was prevented by the declaration of the uses, which, although done by the husband alone, was nevertheless binding upon his wife, and therefore excluded a resulting use to him, which would have entitled her to dower. The wife, by joining in the fine or recovery, consented to the uses previously declared of it by her husband; the fine or recovery, and the instrument leading the uses of it, being considered as one and the same transaction.³

6. As a subsequent declaration of uses by the husband alone could, unless the wife had dissented, have bound her even as to her own estate,⁴ it seems that if the husband had by a subsequent deed declared the use of the fine to a purchaser, and no signs appeared that the wife at the time had dissented, the purchaser would have been entitled to the estate discharged of dower. It does not, however, appear that the point has ever been expressly decided.⁵

7. But fines and recoveries have been abolished in England by the 3 & 4 Will. IV., ch. 74, and a statute deed is substituted in their stead. And the late Dower Act of 3 & 4 Will. IV., ch. 105, has, as to marriages contracted since January 1, 1834, placed the right of dower entirely within the control of the husband.⁶

Release of dower in the United States.

8. By the custom of London, a deed of bargain and sale by husband and wife, acknowledged before the lord mayor, or the

¹ Post, § 7.

² Park, Dow. 194; 1 Roper, H. & W. 536-7.

³ Haverington's case, Owen, 6; Beckwith's case, 2 Rep. 57 a.; 1 Roper, H. & W. 539; Park, Dow. 200.

⁴ See 2 Bright, H. & W. ch. 24, § 2.

⁵ 1 Bright, H. & W. p. 526, pl. 6; 1 Roper, H. & W. 538. See Park, Dow. 197-200.

⁶ Vol. i., Appendix.

recorder and one alderman, (the wife being separately examined), and proclaimed and enrolled in the Husting's Court, is as effectual to bar dower as a fine or recovery at common law.¹ The method of releasing dower by deed, adopted in this country at an early day, seems to have had its origin in this custom.²

9. In Virginia, the mode of conveyance by fine was never in use; but following, as is supposed, the local custom above referred to, it became usual to relinquish dower by deed executed by husband and wife, the latter acknowledging the conveyance in a private examination before the general or county court.³ This mode of conveyance was afterwards confirmed and adopted by the colonial legislature.⁴ In Maryland, although it is said that lands were sometimes conveyed by fine passed in the provincial or county court,⁵ or by common recovery,⁶ yet it would seem that there had been many instances of conveyances in the form of mere common contracts, with intention to bind the interests of married women as if they had been sole, which were afterwards ratified and confirmed.⁷ It appears, also, that the provincial legislature of Maryland at a very early period made provision for quieting possessions and establishing the manner of conveying lands by deed acknowledged and recorded;⁸ and prescribed that form of private acknowledgment of conveyances of real estate and relinquishment of dower from *femes covert*⁹ which has been re-enacted and continued in force from that time forward.¹⁰

10. Fines have never been in use in Massachusetts as conveyances of land;¹¹ but recoveries were sometimes resorted to for the purpose of barring estates tail, before the adoption of the statute permitting that to be done by deed.¹² The doctrine has been

¹ Hughes, Writs; Park, Dow. 195; 1 Roper, H. & W. 539.

² Chase's case, 1 Bland, Ch. 206, 229.

³ 1 Hen. Stat. 145, note. See vol. i., ch. ii., § 3.

⁴ 2 Hen. Stat. 317; 5 Ibid. 410, 411; 12 Ibid. 155; Chase's case, 1 Bland, Ch. 229.

⁵ Hammond's Lessee v. Brice, 1 Har. & McH. 323. ⁶ Md. Stat. 1766, ch. 21.

⁷ Md. Stat. 1671, ch. 6; 1694, ch. 11.

⁸ Md. Stat. 1663, ch. 7.

⁹ Md. Stat. 1674, ch. 2, § 5; 1692, ch. 30, § 5; 1699, ch. 42, § 6. See vol. i., ch. ii., § 21.

¹⁰ Md. Stat. 1715, ch. 47; Rhea v. Rhenner, 1 Peters, U. S. R. 105; Hammond's Lessee v. Brice, 1 Har. & McH. 323; Chase's case, 1 Bland, Ch. 229.

¹¹ Stearns, Real Act. 11; 1 Washb. R. P. 2d ed. 199, note; Fowler v. Shearer, 7 Mass. 14, 20; Powell v. Monson, &c., Man. Co., 3 Mason, 347, 351.

¹² Stearns, Real Act. 11.

established in Massachusetts, however, from the earliest times, that a married woman may convey her estate, and extinguish her dower, by joining her husband in the deed of conveyance. When this doctrine was first adopted, it is not now possible to ascertain with entire certainty. By some of the ablest lawyers and judges of that State, it has been resolved into New England common law. Judge Story has expressed the opinion,¹ that it took its rise from the Colonial Act of 1641, which secured to the wife her dower unless barred "by some act or consent of such wife, signified by writing under her hand, and acknowledged before some magistrate or others, authorized thereunto."²

11. There does not appear to have been any statute in force in New York providing for the relinquishment of dower, until in 1771. The charter of the Duke of York, of 1683, declared "that no estate of a *feme covert* should be sold or conveyed but by deed acknowledged by her in some court of record, the woman being secretly examined, if she doth it freely, without threats or compulsion of her husband;"³ but it seems that this charter was not regarded as in force after the revolution of 1688.⁴ The statute of 1771 required a separate examination and acknowledgment before an authorized officer, to pass the estate of a *feme covert*.⁵ Prior to that time a loose and unsettled practice had prevailed as to the mode of executing and acknowledging deeds of conveyance.⁶ It seems to have been a disputed question whether the common law modes of relinquishing dower by fine and recovery were ever in use;⁷ but it is said that fines have been occasionally levied in that State for the purpose of barring claims.⁸ Fines and recoveries were abolished by statute in 1830.⁹

12. In Pennsylvania, at an early day, it was usual for married

¹ In *Powell v. Mon. & Brimf. Man. Co.*, 3 Mason, 347, 351. See, also, *Fowler v. Shearer*, 7 Mass. 14, 20, 21; 1 Washb. R. P. 2d ed. 199, pl. 10; Washb. Jud. Hist. Mass. 38; Stearns, Real Act. 279.

² Anc. Laws & Chart. Mass. Bay, 99. See vol. i., ch. ii., § 6.

³ 2 Laws N. Y. (1813), App. No. II, p. 5. See vol. i., ch. ii., § 10, and note.

⁴ *Jackson v. Gilchrist*, 15 John. 89, 112.

⁵ 2 Van Schaack, 611; 3 Rev. Stat. N. Y. App. 22.

⁶ *Jackson v. Gilchrist*, 15 John. 89, 114; *Jackson v. Schoonmaker*, 2 John. 234. See, also, the preamble to the Act of 1771.

⁷ *Jackson v. Gilchrist*, 15 John. 89, 109.

⁸ 4 Kent, 497; 1 Washb. R. P. 2d ed. 71, note. See *McGregor v. Comstock*, 17 N. Y. 162.

⁹ 2 Rev. Stat. N. Y. 343, § 24.

women to dispose of their lands or to relinquish their dower by a common deed or instrument of writing executed and authenticated as if they had been sole, without an acknowledgment or separate examination; and as title to many valuable estates depended upon conveyances executed in this form, they were generally sustained by the courts;¹ but in 1770 an Act was passed, providing for the execution and acknowledgment of deeds by husband and wife, and rendering a separate examination of the wife by the officer taking the acknowledgment, essential to their validity.² The interests of the wife were guarded in a similar manner in East Jersey as early as in 1682.³ In Rhode Island, there seems to have been no mode provided, prior to 1798, for the relinquishment of dower. It was customary, however, antecedently to that date, for the wife to join her husband in the execution of his deed, and conveyances so made were sustained by the courts.⁴

13. The mode of relinquishing dower by deed thus introduced by the colonists, has been generally adopted in the United States. The instances in which a fine or recovery has been resorted to for that purpose are extremely rare and of very ancient date.⁵

The husband and wife must join in the execution of the deed.

14. The rule, as established in many of the States, requires the husband and wife to unite in the execution of the deed by which it is sought to divest her estate; a release, or conveyance executed during coverture by the wife, in which the husband does not join, is, as a general rule, ineffectual to bar her dower.

15. In *Fowler v. Shearer*,⁶ Parsons, Ch. J., in discussing this

¹ *Davey v. Turner*, 1 Dall. 11; *Lloyd v. Taylor*, Ibid. 17; *Watson v. Bailey*, 1 Binn. 470; *Kirk v. Dean*, 2 Binn. 341; *Chase's case*, 1 Bland, Ch. 229.

² Act 24 Feb., 1770, § 2; *Purdon's Dig. by Brightly*, 311, § 12. Fine or recovery may be resorted to in Pennsylvania for the purpose of barring estates tail. *Purdon's Dig. by Brightly*, 421, § 1. See, also, p. 410, § 7; 4 Kent, 497.

³ *Field's Prov. Courts of N. J.* 206. See vol. i., ch. ii., § 9. See, also, Act of Dec. 2, 1743, *Allinson*, 132. In *Moore v. Rake*, 2 Dutch. 574, 578, it is said by the chancellor, that previous to the enactment of 1743, "a *feme covert* could not make a valid conveyance of her interest in land in the then colony of New Jersey." Fines were abolished in New Jersey in 1799. *Elmer's Dig.* 90. See *Richman v. Lippincott*, 9 Amer. Law Reg. 369, 371.

⁴ *Manchester v. Hough*, 5 Mason, 67.

⁵ See *Durant v. Ritchie*, 4 Mason, 54; *Manchester v. Hough*, 5 Mason, 67, 69; *Albany Fire Ins. Co. v. Bay*, 4 Comst. 9.

⁶ *Fowler v. Shearer*, 7 Mass. 14.

subject, remarked: "The usual mode by which a wife is joined, is by introducing her in the close of the deed as expressly relinquishing all claim to dower in the premises sold, and by her executing the deed with her husband. And it has been sometimes done by her separate deed, subsequent to her husband's sale, in which the sale is recited as a consideration on which she relinquishes her claim to dower. The deed of a *feme covert* thus executed to bar her claim to dower is not voidable, but will bind her as to such claim." The question afterwards came before Story, J., and it was expressly held by him that "a release of dower, executed by the wife alone, long after the conveyance of the land by her husband, and for a new consideration, is not, in Massachusetts, an extinguishment of the dower."¹ In commenting upon the concluding paragraph quoted above from the opinion of Ch. J. Parsons, the learned judge said: "It is this sentence which creates the whole difficulty in the argument at the bar. If it means that it may be done by a separate deed of the wife, executed after the deed of her husband, but on the same day, or as a *part of the same transaction*, then there is no difficulty in reconciling it with the language of the statute, for the wife may be truly said to join in the sale, when she is a party to it at the time when it is made, whether she join in her husband's deed or execute a separate deed. And the words of the learned judge are not inconsistent with this construction. Although he speaks of a separate deed of the wife, subsequent to the sale by her husband, this may well be limited to mean that the husband's act of sale must have a legal priority to satisfy the words of the statute. And the words 'in which the sale is recited as a consideration' favor the notion that the learned judge had in view such cases only in which the sale was the moving consideration, and the act was part of the *res gestæ* in the contemplation of all parties." Shortly afterwards it was held by the same judge, that a separate release by the wife, written upon the deed of the husband several months after it had been executed by him, did not bar her dower.²

16. The decisions by Judge Story, above cited, were made in the Circuit Court of the United States, one in 1824, and the other in 1826. In 1829, in the Supreme Court of Massachusetts, the

¹ Powell v. Monson, &c., Man. Co., 3 Mason, 347.

² Hall v. Savage, 4 Mason, 273.

doctrine of *Fowler v. Shearer* appears to have been affirmed. "To render the transfer of an estate effectual and complete," said Wilde, J., "it is not essential that the sale by the husband, and the relinquishment of dower by the wife, should be made by the same deed or at the same time, although this is the usual mode of conveying. But if after a sale by the husband, or after his estate has been taken on execution, the wife will voluntarily relinquish her claim to dower by a separate deed, it will effectually bar her dower."¹ In a more recent case, however, the rule laid down by Judge Story was followed; and, referring to the remarks of Wilde, J., cited above, the court said: "If by the wife's 'separate deed subsequent to her husband's sale,' be meant a separate deed executed by him and her jointly, in which she relinquishes her claim to dower in the land conveyed by him alone in the first deed, or taken on execution against him, then we do not doubt that, under the statutes of Wm. III. and 1783, dower might be barred by such deed. It was so decided in *Stearns v. Swift* above cited, before the revised statutes were passed, and is expressly so provided by those statutes, c. 60, § 7."² But if by the wife's 'separate deed' be meant a deed by her alone, relinquishing dower in land previously conveyed by her husband alone, we are of opinion that such deed was not a bar to dower under the statutes first mentioned. So it was decided in *Powell v. Monson & Brimfield Manufacturing Co.*,³ and in *Shaw v. Russ*,⁴ for reasons which we deem conclusive and to which we refer without repeating them. And the Revised Statutes, c. 70, § 7, by necessary implication, prevent such a deed from being a bar since 1836."⁵

¹ *Stearns v. Swift*, 8 Pick. 532, 536.

² See *Stearns*, Real Act. 289, 290.

³ Ante, § 15.

⁴ *Shaw v. Russ*, 14 Maine (2 Shepl.), 432; post, § 17.

⁵ *Page v. Page*, 6 Cush. 196. And see *Richards v. Chace*, 2 Gray, 383; *Greenough v. Turner*, 11 Gray, 332. Section 7 of ch. 60 of the Rev. Stat. of 1836, provides that "a married woman may bar her right of dower in any estate conveyed by her husband, by joining with him in the deed conveying the same, and therein releasing her claim to dower; or by releasing the same by a subsequent deed *executed jointly with her husband*." But in the General Statutes of 1860, this language is materially changed. Section 8, ch. 90, enacts that a married woman may bar her right of dower "by joining in the deed conveying the same, and therein releasing her right to dower; or by releasing the same by a subsequent deed *executed separately, or jointly with her husband*."

17. The rule laid down by Judge Story has been followed in Maine. In the case of *Shaw v. Russ*,¹ a separate release had been executed by the wife several months after her husband had conveyed his estate, and it was held that her dower was not barred thereby. The opinion of Chief Justice Parsons in *Fowler v. Shearer*,² was adverted to in these terms: "He points out the modes in which the deed of the wife, joining with her husband, may be effectual for the relinquishment of dower. This he says may be done by uniting in the original conveyance, or subsequently by her separate deed. It may deserve consideration whether, by her separate deed, he is to be understood to mean anything more than an instrument separate and distinct from the original conveyance, without repeating that she thus joined with her husband in executing such separate deed; as he was professedly stating in what manner the joining with her husband, authorized by statute, was executed. The *dictum*, in the connection in which it stands, is not altogether free from obscurity. But if by her separate deed he means an instrument in which her husband does not join, which, but for what precedes, may be the more obvious construction, it does not appear to us to be warranted by the provincial statute to which he adverts, or by that of the commonwealth, which is substantially to the same effect." So where the husband mortgaged his estate, his wife not joining, and several weeks afterwards she executed upon the back of the mortgage an instrument under her hand and seal, relinquishing to the mortgagee her right of dower, reciting therein that the relinquishment was made with the consent of her husband, as testified by his being a party thereunto, and upon the same consideration, but the husband did not unite with her in the execution of that instrument, it was held that it constituted no bar to her claim of dower.³ The Revised Statutes of 1857 provide that a married woman may bar her dower in an estate conveyed by her husband, by joining in the same deed, or in a subsequent deed; and by her sole deed when her husband is under guardianship.⁴

¹ *Shaw v. Russ*, 14 Maine (2 Shepl.), 432.

² See ante, § 15.

³ *French v. Peters*, 33 Maine, 396. See *Rowe v. Hamilton*, 3 Greenl. 63; Rev. Stat. Maine (1840-41), ch. 95, § 9.

⁴ Rev. Stat. Maine (1857), ch. 103, § 8.

18. In New Jersey,¹ Illinois,² Indiana,³ Ohio,⁴ Arkansas,⁵ Kentucky,⁶ South Carolina,⁷ Virginia,⁸ and Delaware,⁹ the rule is the same. In Kentucky, it has been held that the separate deed of the wife is invalid although the husband be absent in another State.¹⁰ By the present statute of that State the wife may relinquish her dower by a separate instrument where her husband has previously conveyed the estate.¹¹ And in Illinois the husband must join although the release be of dower in the lands of a former husband.¹² Numerous decisions to the same effect have been made in Pennsylvania; and it is held in that State that the Act of 1848 has not changed the law in this respect.¹³

19. In Rhode Island, the wife may relinquish her dower by uniting with her husband in the conveyance; or by a subsequent deed executed jointly with him; or by joining in a deed by his guardian.¹⁴ Where the estate of her husband has been already conveyed, she may bar her right by a deed executed by her in presence of two witnesses, and duly acknowledged.¹⁵ In Michigan, any mar-

¹ Dodge v. Aycrigg, 1 Beasl. Ch. 82; Moore v. Rake, 2 Dutch. 576.

² 2 Stat. Ill. 1858, p. 961, § 15; p. 962, § 21; Osborn v. Horine, 19 Ill. 124.

³ Scott v. Purcell, 7 Blackf. 66; Davis v. Bartholomew, 3 Ind. 485.

⁴ 1 Rev. Stat. Ohio, by Swan & Critchf., p. 461, § 2. See Hinde v. Longworth, 11 Wheat. 199; 6 Cond. U. S. 270; Williams v. Robson, 6 Ohio St. 510; Newell v. Anderson, 7 Ohio St. 12.

⁵ Stat. Ark. 1858, p. 265, § 11; Elliott v. Pearce, 20 Ark. 508; Witter v. Biscoe, 13 Ark. (8 Eng.), 422.

⁶ Ashby v. Woolfolk, 3 Met. (Ky.), 540; Kay v. Jones, 7 J. J. Marsh. 38; Moore v. Tisdale, 5 B. Mon. 352. To pass the title or dower right of a *feme covert* in land, the deed must be sealed and delivered by her as well as by her husband; a certificate of her acknowledgment on the husband's deed, which she has not in fact executed, is of no avail. Brown v. Starke, 3 Dana, 316. See Worthington v. Middleton, 6 Dana, 300; Applegate v. Gracy, 9 Dana, 215.

⁷ 1 Brev. Dig., p. 269, § 5, (Act of 1731); 2 Ibid., p. 349, § 22, (Act of 1785).

⁸ Va. Code, 1849, p. 513, § 4; Sexton v. Pickering, 3 Rand. 468. On the sale of the real estate of an insane or infant husband, under a decree of the court, the wife may join in the conveyance, and thereby release her dower in the same manner as if she had joined with her husband. Va. Code, 1849, p. 536, § 9.

⁹ Del. Rev. Code, 1852, p. 267, § 4; Harris v. Burton, 4 Harring. 66.

¹⁰ Moore v. Tisdale. 5 B. Mon. 352.

¹¹ 1 Ky. Rev. Stat. by Stanton, p. 281, §§ 20, 21.

¹² Osborn v. Horine, 19 Ill. 124.

¹³ Willing v. Peters, 7 Barr, 287; Peck v. Ward, 6 Harris, 506; Ulp v. Campbell, 7 Harris, 361; Thorndell v. Morrison, 1 Casey, 326; Stoops v. Blackford, 3 Casey, 213; Trimmer v. Heagy, 4 Harris, 484; Richards v. McClelland, 5 Casey, 385; Johnson v. Fritz, 8 Wright, 449.

¹⁴ Rev. Stat. R. I. 1857, p. 317, § 10.

¹⁵ Ibid.

ried woman residing in the State may release her dower by joining with her husband in the deed, or with his guardian, if he be under age.¹ The law is the same in Wisconsin,² Minnesota,³ and Oregon.⁴ In Alabama, husband and wife are required to unite in the conveyance;⁵ but where the deed of the husband has been recorded without the relinquishment of the wife, she may make a separate release of her dower.⁶ In Florida, the wife may relinquish by making herself a party to the deed of her husband, or by a separate release under her hand and seal.⁷ And by the present statute of Maryland, the wife may relinquish her dower by joining with her husband, or by her separate deed.⁸ In New Hampshire, a wife may relinquish her dower by a separate deed executed without the concurrence of her husband. Thus, where the husband conveyed a tract of land, and several years afterwards, and during the coverture, the wife, by a separate deed released her inchoate right, it was held that she was estopped from claiming dower after the death of her husband.⁹ In another case, the court said that where the assent of the husband "is not necessary to the validity of her conveyance, as in the case of dower, she may alone, and in a separate deed, and at a separate time, convey her right of dower."¹⁰

20. It is not necessary in the States where the husband and wife are required to join in the deed, that the wife should execute the conveyance simultaneously with her husband, nor upon the same day. It is sufficient if it be executed by her before it is delivered, although after it has been executed and acknowledged by her husband.¹¹ Where a deed was executed and recorded as to the husband,

¹ 2 Comp. Laws Mich. p. 852, § 13; p. 963, § 14. As to the conveyance by the wife of her separate estate, see 2 Comp. Laws, p. 966; *People v. Horton*, 4 Mich. 77; *Farr v. Sherman*, 11 Mich. 33; *Watson v. Thurber*, *Ibid.* 457; *Brown v. Fifield*, 4 Mich. 322; *Starkweather v. Smith*, 6 Mich. 377.

² Rev. Stat. Wis. 1858, p. 547, § 13.

³ Stat. Minn. 1858, p. 408, § 13.

⁴ Stat. Oregon, 1855, p. 407, § 13.

⁵ Clay's Dig. p. 174, §§ 10, 11.

⁶ *Ibid.* p. 155, § 28.

⁷ Thompson's Dig. p. 178.

⁸ 1 Md. Code, p. 327, § 11. The rule was formerly otherwise. See *Rhea v. Rhenner*, 1 Peters, U. S. R. 105; *Lawrence v. Heister*, 3 Har. & J. 371.

⁹ *Shepherd v. Howard*, 2 N. H. 507.

¹⁰ *Gorden v. Haywood*, 2 N. H. 402, 405. See, also, *Ela v. Card*, 2 N. H. 175. It was held in *Dow v. Jewell*, 18 N. H. 340, that the deed of a married woman to which her husband is not a party, of land not held as her separate property, is invalid.

¹¹ *Frost v. Deering*, 21 Maine, (8 Shepl.) 156; *Montgomery v. Hobson*, Meigs, (Tenn.) 437; *Williams v. Robson*, 6 Ohio St. 510; *Newell v. Anderson*, 7 Ohio St. 12; *Ford v. Gregory*, 10 B. Mon. 175; *Langhorne v. Hobson*, 4 Leigh, 224.

and before it was delivered a commission for the privy examination of the wife was issued and executed, and the commission and privy examination were then recorded, it was held that the deed was thereby perfected as to the wife, although it did not appear that she had signed and sealed it at the time it was recorded as to the husband.¹ So where husband and wife jointly executed and acknowledged, in 1815, a deed for lands of the wife; and in 1829, the coverture still subsisting, the wife separately, and upon a proper examination, again acknowledged the deed before a different officer, both certificates being on the same sheet of paper with the deed, it was held that this was sufficient to cure a defect in the first acknowledgment.² In a case from Alabama, decided in the Supreme Court of the United States, a mortgage had been executed by the husband, his own name only being used in the body of the instrument; but it was also signed by the wife, who at the same time executed upon the same paper a separate release of her dower, and joined with her husband in the acknowledgment. The court held that from an inspection of the whole instrument, it was apparent the intention of the parties was to consider the whole paper as one assurance, and therefore that it was effectual to bar the wife's dower.³

21. Whether a deed executed by a married woman in conjunction with the attorney in fact of her husband, is valid and obligatory upon her, is a question which does not appear to have been often before the courts. In an early Massachusetts case, Chief Justice Parsons, remarked, that the consent of the husband to a conveyance by the wife, "must be manifested by his joining in the deed, either personally or by attorney;"⁴ and in Ohio, it has been held, that a deed so executed will divest the wife's dower.⁵ In Mississippi, it has been determined, that a power of attorney by the husband, authorizing an agent to sell and convey *his* land, does not authorize the agent to join with the wife in a conveyance of her realty; and a deed made jointly by such agent and the wife, is a nullity so far as it relates to land belonging to her.⁶

22. In some of the States statutes have been passed making

¹ Langhorne v. Hobson, 4 Leigh, 224.

² Newell v. Anderson, 7 Ohio St. 12. See Jackson v. Stevens, 16 John. 110; Doe v. Howland, 8 Cow. 277.

³ Dundas v. Hitchcock, 12 How. U. S. R. 256.

⁴ Fowler v. Shearer, 7 Mass. 14, 21.

⁵ Glenn v. Bk. U. S., 8 Ohio, 72.

⁶ Toulmin v. Heidelberg, 32 Missis. 268. See Dawson v. Shirley, 6 Blackf. 531. In Massachusetts, the wife of a man under guardianship, may join with the guardian

important innovations upon the rules of the common law relative to the powers of married women; and the question has been much discussed, whether these statutes do not enable a married woman to convey her separate estate, or relinquish her inchoate dower, independently of any action on the part of her husband.¹ In Pennsylvania, as we have seen, it is held that the common law rule is not changed.² In New York, the decisions as to the effect of the legislation in that State in favor of married women, have been conflicting, and the questions arising thereunder are not yet fully settled.³ But it seems that in Wisconsin,⁴ Iowa,⁵ and Kansas,⁶ the concurrence of the husband is not necessary to a valid release of dower.⁷

Whether the wife may release dower by attorney.

23. It has been held in Delaware⁸ and Vermont,⁹ that a married woman can not execute a valid power of attorney to convey lands even in connection with her husband. It was decided in Virginia, that the provisions of the revised code¹⁰ do not embrace powers of attorney, nor authorize two justices to take and certify the privy examination of the wife as to her execution thereof; but that a deed of husband and wife, executed under a power of attorney, is valid as to the husband, though void as to the wife.¹¹ In Indiana, prior to the revised statutes of 1852, a married woman could not acknowledge a deed by attorney; the courts holding that that mode

in a conveyance of her husband's lands for the purpose of releasing her dower. Gen. Stat. Mass. p. 539, § 11. Like provisions are in force in other States. Ante, §§ 18, 19. In Ohio, provision is also made for the release of dower upon a sale by order of court, of the real estate of a husband who is insane. 59 Ohio Laws, 55. So in Virginia. Va. Rev. Code, 1849, p. 536, § 9.

¹ See post, § 45.

² Ante, § 18. See note to *Emerson v. Clayton*, 3 Amer. Law Reg. N. S. 530, 533.

³ See *Fireman's Ins. Co. v. Bay*, 4 Barb. 407; *Cruger v. Cruger*, 5 Barb. 225; *Graham v. Van Wyck*, 14 Barb. 531; *Voorhees v. Presb. Church*, 17 Barb. 104; *Smith v. Colvin*, Ibid. 157; *Dickerman v. Abrahams*, 21 Barb. 551; *Simmons v. McElwain*, 26 Barb. 419; *Winans v. Peebles*, 31 Barb. 371; s. c. 32 N. Y. 423; *White v. Wager*, 32 Barb. 250; s. c. 25 N. Y. 328; *Crain v. Cavana*, 36 Barb. 410; *Porter v. Mount*, 41 Barb. 561; *Kolls v. De Leyer*, Ibid. 208; *Wallace v. Bassett*, Ibid. 92; *Goss v. Cabill*, 42 Barb. 310; *Gillet v. Stanley*, 1 Hill, 121.

⁴ See Rev. Stat. Wis. 1858, § 539, § 12; *Dodge v. Silverthorn*, 12 Wis. 644.

⁵ *Blake v. Blake*, 7 Iowa, 46. See Laws of Iowa, Rev. 1860, § 2255.

⁶ Comp. Laws Kansas, 1862, p. 354, § 9.

⁷ See, also, ante, § 19.

⁸ *Lewis v. Coxe*, 5 Harring. 401.

⁹ *Sumner v. Conant*, 10 Verm. 9. See *Earle v. Earle*, 1 Spence, 347.

¹⁰ 1 Rev. Code, ch. 99, § 15.

¹¹ *Shanks v. Lancaster*, 5 Gratt. 110.

of acknowledgment did not admit of her examination by the officer taking it in the manner prescribed by the law then in force;¹ but they did not decide that she could not, jointly with her husband, appoint an attorney to execute a deed in her name;² and now, by statute, it is expressly provided that she may exercise this power.³ In Massachusetts,⁴ New York,⁵ Pennsylvania,⁶ Rhode Island,⁷ Ohio,⁸ Iowa,⁹ Minnesota,¹⁰ and other States, the power to convey by attorney is also conferred.¹¹ In Kentucky, non-resident married women may convey by attorney; but this privilege is not extended to residents.¹²

24. It is not necessary that the wife should sign in person, the deed releasing her dower. It is settled that a deed is well executed if the name of the grantor be put to it by his direction and in his presence, by the hand of another person;¹³ and a deed executed by the wife in this manner, is sufficient to pass her dower.¹⁴ So it is as competent for her to have her name placed to the deed by her husband, by her direction, if it be done in her presence, as by any other person.¹⁵

The release must be under seal.

25. In most of the States it is essential to the validity of a release of dower, that it be under seal. An unsealed instrument, although conforming to the law in all other respects, will not bar the right

¹ Dawson v. Shirley, 6 Blackf. 531. ² Ibid. p. 532.

³ 1 Rev. Stat. Ind. (1852), p. 237, § 27.

⁴ Gen. Stat. Mass. ch. 89, § 29. See Roarty v. Mitchell, 7 Gray, 243.

⁵ Willard, Real Est. 269.

⁶ Purdon's Dig. by Brightly, p. 312, § 12, and note (c); Fulweiler v. Baugher, 15 S. & R. 45.

⁷ Rev. Stat. R. I. 1857, p. 317, § 9.

⁸ 1 Swan & Critchf. p. 464, § 3. See Bocock v. Pavey, 8 Ohio St. 270.

⁹ Wilkinson v. Getty, 13 Iowa, 157; Gridley v. Westbrook, 23 How. U. S. 503. If the attorney sign the name of the husband only, the wife is not barred. Wilkinson v. Getty, *supra*

¹⁰ Stat. Minn. 1858, p. 402, §§ 43, 44. ¹¹ See Koch v. Briggs, 14 Cal. 262.

¹² 1 Rev. Stat. Ky. by Stanton, p. 285. In Kentucky, a married woman could not convey by attorney prior to 1812. Steele v. Lewis, 1 Mon. 48.

¹³ Shep. Touch. 57; Ball v. Dunsterville, 4 T. R. 313; King v. Longnor, 1 Nev. & Man. 576; Gardner v. Gardner, 5 Cush. 483; Wood v. Goodridge, 6 Cush. 117, 121; Burns v. Lynde, 6 Allen, 309, 310; Irvin v. Thompson, 4 Bibb, 295; 2 Washb. R. P. 2d ed. 601, pl. 15. *Contra*, Wallace v. McCollough, 1 Rich. Eq. 426.

¹⁴ Frost v. Deering, 21 Maine, (8 Shepl.) 156.

¹⁵ Ibid. *Contra* in Connecticut. Linsley v. Brown, 13 Conn. 192.

of the wife.¹ But where two married women join in the execution of a deed, both may use the same seal.²

26. In Kentucky,³ Alabama,⁴ and Iowa,⁵ it is provided by statute that real estate may be conveyed by an instrument not under seal. In these States, therefore, a release of dower is valid although no seal is attached. But in Iowa, a conveyance of real estate without a seal, executed prior to the code of 1851, is not valid as a deed, although recorded after that act, which rendered a seal unnecessary, went into effect.⁶

The deed must contain words of release or grant.

27. The wife, to bar her dower, must not only join with her husband in the execution of a deed of his estate, but the conveyance must contain words constituting a release or grant of her right. "The usual mode by which a wife is joined," says Ch. J. Parsons,⁷ "is by introducing her in the close of the deed, as expressly relinquishing all claim to dower in the premises sold." "The deed," says Story, J.,⁸ "must contain apt words to make her a grantor; otherwise the deed conveys only the right of the husband."⁹

28. It has been several times decided, that the mere signing and sealing of the deed by the wife, is ineffectual to divest her right.¹⁰ Nor will the insertion of her name in the introductory clause describing the parties, or in the concluding part of the deed, unaccompanied by a statement as to the purpose for which she joins in the execution, or any reference to her contingent interest, make any difference.¹¹ So, if it be expressed that she joins, "in token of her

¹ Manning v. Laboree, 33 Maine, 343; Sargent v. Roberts, 34 Maine, 135; Giles v. Moore, 4 Gray, 600; Walsh v. Kelly, 34 Pa. St. 84; Brown v. Starke, 3 Dana, 316. See Fowler v. Shearer, 7 Mass. 14; Foster v. Dennison, 9 Ohio, 121.

² Tasker v. Bartlett, 5 Cush. 359. ³ 1 Rev. Stat. Ky., by Stanton, ch. 24, § 1.

⁴ Ala. Code, 1852, § 2198; Clay's Dig. 158, § 4; Shelton v. Armor, 13 Ala. 647.

⁵ Laws of Iowa, Rev. 1860, p. 323, § 1823; Pierson v. Armstrong, 1 Clarke (Iowa), 282.

⁶ Switzer v. Knapps, 10 Iowa, 72. ⁷ In Fowler v. Shearer, 7 Mass. 14, 20.

⁸ In Powell v. Monson, &c., Man. Co., 3 Mason, 347, 349; and in Hall v. Savage, 4 Mason, 273, 275. See, also, the remarks of Wilde, J., quoted post, § 29.

⁹ See 4 Kent, 59; 1 Washb. R. P., 2d ed. 200, pl. 12; Stearns, Real Act. 289.

¹⁰ Catlin v. Ware, 9 Mass. 218; Lufkin v. Curtis, 13 Mass. 223; Powell v. Monson, &c., Man. Co., 3 Mason, 347; Hall v. Savage, 4 Mason, 273; Cox v. Wells, 7 Blackf. 410; Davis v. Bartholomew, 3 Ind. 485; McFarland v. Febiger, 7 Ohio, 194; Lothrop v. Foster, 51 Maine, 367.

¹¹ Lufkin v. Curtis, 13 Mass. 223; McFarland v. Febiger, 7 Ohio, 194; Carter v. Goodin, 3 Ohio St. 75, 78; Agricultural Bk. v. Rice, 4 How. U. S. R. 225.

assent thereto;"¹ or, "in token of her free consent;"² or, that she agrees "in the above conveyance;"³ or words of similar import be employed, the right of dower is not barred. "We are not to inquire," said the court, in *Leavitt v. Lamprey*, "what was her motive and intention in joining in a deed with her husband, for her right of dower is not to be barred by any supposed intention not manifested by the words of the deed." "The language used by the wife," the court observed in *Stevens v. Owen*, "to bar her of her right of dower, should be explicit, so that she could not misunderstand its import. Very little, if anything, is to be left to inference." In *McFarland v. Febiger*, the court said: "Unless the deed contain words applicable to her estate, and evinces her intention to convey it, it is the deed of the husband only." And the remarks of Judge Story in *Hall v. Savage*, are equally pointed. "The rule of law," he said, "appears to me plain, that the wife can not release her dower, except there be apt words to express such intention. Doubtful words ought never to be construed to have such an effect."⁴ And if the deed do not contain words proper to pass or extinguish the interest of the wife, the omission can not be aided by the certificate of acknowledgment.⁵ So if the wife sign and seal a deed in blank, and it is afterwards filled up differently from what was intended at the time she signed it, she is not estopped from showing the fraud and claiming her dower, even against an innocent grantee. Thus, where a married woman joined with her husband in signing and sealing the blank form of a deed designed to be thereafter filled up so as to convey a small piece of ground to a school district as a site for a school-house, and it was duly attested and acknowledged; and afterwards, the grantor, without the knowledge or consent of his wife, filled up the blanks so as to

¹ *Leavitt v. Lamprey*, 13 Pick. 382.

² *Stevens v. Owen*, 25 Maine, (12 Shepl.) 94. ³ *Hall v. Savage*, 4 Mason, 273.

⁴ See, also, *Westfall v. Lee*, 7 Clarke (Iowa), 12; *Melvin v. Proprietors, &c.*, 16 Pick. 137; *Bruce v. Wood*, 1 Met. 542; *Purcell v. Goshorn*, 17 Ohio, 105; *Raymond v. Holden*, 2 Cush. 264; *Agricultural Bk. v. Rice*, 4 How. U. S. R. 225; *Cincinnati v. Newell*, 7 Ohio St. 37; *Bartlett v. Bartlett*, 4 Allen, 440; *Dodge v. Nichols*, 5 Allen, 548.

⁵ *Davis v. Bartholomew*, 3 Ind. 485. It is also held in this case, that in the absence of words of grant or release, the joining by a married woman with her husband in the covenants contained in a deed, does not estop her from claiming dower. See, also, *Aldridge v. Burlison*, 3 Blackf. 201. The authorities do not agree as to the effect to be attached to the covenants of a married woman. See ante, ch. xi., § 21, note.

make the deed, on its face, a mortgage on a valuable tract of land to secure the payment of a large sum of money, the mortgagee being wholly innocent of the fraud, it was held that the right of dower of the wife was unaffected thereby.¹

29. But a release of dower need not be in technical form; nor are words of inheritance essential to its validity.² It is sufficient if a wife join in a deed with her husband "in token of her relinquishment of dower;"³ or, "in token that she relinquishes her right to dower in the premises;"⁴ or, if she declare in the deed that she thereby "relinquishes her right of dower in the above premises."⁵ In all these cases there is an express reference to, and relinquishment of, the right of dower.⁶ So, if the wife unite with her husband in the granting part of a deed, without any reference, in terms, to her dower, she will be barred.⁷ Nor will it make any difference in such case, that she is the owner in fee of an undivided share in the premises conveyed. In *Learned v. Cutler*,⁸ in which this point arose, the demandant and her husband, in the lifetime of the latter, had conveyed certain parcels of land, in one of which, in the case before the court, dower was demanded. In the deed it was stated that the husband was the sole owner of an undivided three-fourths part, and that the husband and wife were seized of the remaining fourth part in her right. The husband and wife joined in the granting part of the deed in the usual form, making use of the words, "give, grant, sell and convey." Nothing was said about dower in the deed, nor was there any formal relinquishment. The husband having died, the widow was demanding her dower. But the court held that she was barred. In speaking of the question as to what shall be sufficient to bar the wife of dower, they said: "She must not only join with her husband in a deed of conveyance of the land, by executing the deed, the conveyance being made by him, but the deed must contain apt words of grant or release on her part; and if it does, it will bar her right of dower, although she had no vested title in the land at the time of the con-

¹ *Conover v. Porter*, 14 Ohio St. 450. See *Drury v. Foster*, 2 Wallace, U. S. R. 24.

² *Gray v. McCune*, 23 Pa. St. (11 Harris), 447. ³ *Stearns v. Swift*, 8 Pick. 532.

⁴ *Frost v. Deering*, 21 Maine, 156; *Usher v. Richardson*, 29 Maine, 415.

⁵ *Davis v. Bartholomew*, 3 Ind. 485.

⁶ See, also, *Dundas v. Hitchcock*, 12 How. U. S. R. 256.

⁷ *Learned v. Cutler*, 18 Pick. 9; *Smith v. Handy*, 16 Ohio, 191.

⁸ *Learned v. Cutler*, *supra*.

veyance, and no title passed from her to the grantee. The grant or release of the wife operates by way of estoppel or extinguishment of her right, so as to bar any future claim of dower which may accrue to her after the death of her husband. The usual form is for the wife simply to relinquish or release her right of dower; but words of grant are equally efficacious and proper to bar her right; for in neither case does her deed pass any title to the estate. So it is not necessary that she should release or grant her right of dower *eo nomine*; any other words showing an intention on her part to relinquish her dower, will be sufficient. And if she joins her husband in the sale, and undertakes to convey the land jointly with him, this generally would be a sufficient indication of her intention to exclude herself from any claim of dower. By joining in the words of grant she must be understood to give or intend to give, all the right and title she was capable of giving, whether by way of passing an estate, or extinguishing or barring a right depending on a contingency."

30. In New Hampshire, by established usage, the wife may release her dower by her signature and seal at the foot of her husband's deed, without her name being in any other way mentioned or alluded to in the instrument.¹ In Iowa, it is provided that in every conveyance of real estate, the joining of a wife with her husband, shall be deemed sufficient to pass her right.²

Release by infant feme covert.

31. It is a vexed question whether the deed of an infant is voidable merely, or absolutely void;³ but according to the weight of

¹ *Burge v. Smith*, 7 Foster (N. H.), 332; *Dustin v. Steele*, Ibid. 431.

² Laws of Iowa, Rev. 1860, § 2255.

³ See 2 Kent, 236; 2 Washb. R. P, 2d ed., 580; *Bool v. Mix*, 17 Wend. 119; *Philips v. Green*, 3 A. K. Marsh. 11; *Prewit v. Graves*, 5 J. J. Marsh. 115, 120; *Drake v. Ramsay*, 5 Ohio, 251; *Cresinger v. Welch*, 15 Ohio, 156, 191; *Card v. Patterson*, 5 Ohio St. 319; *Hartman v. Kendall*, 4 Ind. 403; *Kendall v. Lawrence*, 22 Pick. 540. In some of the authorities, it is said that an infant must disaffirm his deed within a *reasonable* time after coming of age. 2 Kent, 236; 2 Washb. R. P., 2d ed., 580. In others, it is held, that he has all the time in which to disaffirm the deed, that may run before the Statute of Limitations takes effect. *Drake v. Ramsay*, 5 Ohio, 251; *Cresinger v. Welch*, 15 Ohio, 156, 191. In Maine, it is held that the deed of an infant wife is not void, but may be avoided. *Webb v. Hall*, 35 Maine, 336; *Adams v. Palmer*, 51 Maine, 480. In Missouri, her conveyance is avoided by a subsequent deed, made when she was of age. *Yourse v. Norcours*, 12 Misso. 549.

authority, a release by an infant *feme covert*, is wholly ineffectual to divest her right.¹ "The statute," says the chancellor, in *Sandford v. McLean*,² "which makes valid the deed of a *feme covert* when executed with her husband, and acknowledged by her on a private examination, was never intended to sanction or validate a conveyance by an infant wife." No act of disaffirmance is necessary on the part of the wife, before bringing her suit;³ nor is she required to refund to the purchaser any part of the money paid by him for the premises in which dower is claimed.⁴

32. In some of the States statutes have been passed legalizing the release of dower by infant married women. In Maryland, if courts of equity deem it equitable or proper, they may, on application of any person interested, and on the proper parties being brought before them, decree that the deed of an infant *feme covert* be confirmed and made valid from the time of its execution.⁵ In Indiana, a married woman over the age of eighteen years and under the age of twenty-one years, may convey her right in any lands of her husband, by joining in the execution of his conveyance, if the father, or if there be no father, the mother of such married woman, shall declare, before the officer taking the acknowledgment, that he or she believes that such conveyance is for the benefit of the wife, and that it would be prejudicial to her and her husband to be prevented from disposing of the lands so conveyed. This declaration, with the name of the father or mother, is required to be inserted as a part of the certificate of the officer by whom the acknowledgment is taken.⁶ In Alabama, all married women,

¹ *Priest v. Cummings*, 16 Wend. 617; s. c. 20 Wend. 338; *Sherman v. Garfield*, 1 Denio, 329; *Cunningham v. Knight*, 1 Barb. 399; *Sandford v. McLean*, 3 Paige, 117; *Jones v. Todd*, 2 J. J. Marsh. 359; *Oldham v. Sale*, 1 B. Mon. 76; *Shaw v. Boyd*, 5 S. & R. 309; *Schrader v. Decker*, 9 Pa. St. 14; *Hughes v. Watson*, 10 Ohio, 127; *Thomas v. Gammel*, 6 Leigh, 9; *Markham v. Merrett*, 7 How. (Miss.), 437; *Greenwood v. Coleman*, 34 Ala. 150; *Cloud v. Webb*, 3 Dev. L. 317; *Chandler v. McKinnery*, 6 Mich. 217; 1 Washb. R. P., 2d ed., 200; 2 *Ibid.* 582. Where the certificate of the officer is silent on the subject, the presumption is that the wife was of the proper age. *Battin v. Bigelow*, 1 Peters, C. C., 452. But this presumption may be overcome by evidence. See authorities cited above.

² *Sandford v. McLean*, 3 Paige, 117.

³ *Priest v. Cummings*, 20 Wend. 338; *Hughes v. Watson*, 10 Ohio, 127, 134; *Sandford v. McLean*, 3 Paige, 117; *Thomas v. Gammel*, 6 Leigh, 9.

⁴ *Shaw v. Boyd*, 5 S. & R. 309; *Markham v. Merrett*, 7 How. (Miss.), 437.

⁵ 1 *Maryl. Code*, art. 16, § 31. See Acts 1832, ch. 302, § 7; 2 *Dorsey*, 1094.

⁶ 1 *Ind. Rev. Stat.* 1852, p. 236, § 24. See *Sheets v. Dufour*, 5 *Blackf.* 549.

whether under or over the age of twenty-one, are permitted to release their dower.¹ And by recent statute in Maine,² "the release of dower by a married woman of *any age*, now or hereafter made, by joining in the deed of her husband in the manner required by law, shall be valid."³

33. In a case in Indiana, an infant *feme covert* had joined with her husband in a conveyance of his land. Her husband died after she attained her majority. She continued to reside in the immediate neighborhood for about ten years, and then contracted a second marriage. She lived with her second husband near the land for about three years, and then demanded dower therein. At the time of the conveyance, the land was almost wholly unimproved; but subsequently thereto, the purchaser had been constantly and greatly improving it. It was held, that under the circumstances, the bill would not lie.⁴

Release of dower where the wife is insane.

34. In Massachusetts,⁵ Ohio,⁶ Missouri,⁷ Iowa,⁸ Virginia,⁹ and Wisconsin,¹⁰ provision is made by law for disincumbering the estate of the husband of the contingent dower interest of his wife, in cases where the latter is *non compos mentis*, and therefore incompetent to act in her own behalf. But in the absence of legislation of this character, no power is lodged in the courts to divest the dower of an insane wife, nor in any manner to impair her right.¹¹

35. In a case in Illinois, a bill in equity was filed by a husband, stating that he had made sale of his lands; that the purchase-money had been paid, and that he desired to convey, but was unable to make a good title on account of the insanity of his wife. He prayed the court to appoint some fit person to transfer her interest

¹ Clay's Dig. p. 174, § 9.

² Act of 1863, c. 215, § 1.

³ But this enactment does not render valid a prior release of dower which was voidable when it was executed, and which, before the passage of the Act, had been avoided. *Adams v. Palmer*, 51 Maine, 480.

⁴ *Hartman v. Kendall*, 4 Ind. 403.

⁵ Gen. Stat. Mass. p. 540.

⁶ 1 Swan & Critchf. 852; 60 Ohio Laws, 24; 61 Ohio Laws, 99. And in this State the dower of an incurably insane woman may be disposed of for her benefit. 62 Ohio Laws, p. 102.

⁷ 1 Rev. Stat. Misso. 1855, pp. 680-682, §§ 55-59.

⁸ Laws Iowa, Rev. 1860, §§ 1500-1503.

⁹ Code Va. 1849, p. 537, § 11.

¹⁰ Rev. Stat. Wis. 1858, pp. 550, 551; pp. 575-6, §§ 30-33.

¹¹ *Ex parte McElwain*, 29 Ill. 442; *Eslava v. Lepretre*, 21 Ala. 504.

by joining with him in the due execution of the deed. But the court refused his prayer. "Insanity," they said, "does not furnish any reason for a court of equity to interfere to deprive a woman of dower. A woman can not be deprived of dower but by her voluntary act."¹ So in Alabama, where a guardian was appointed for a married woman by the orphans' court, upon the mere petition of her husband alleging that she was *non compos mentis*, without the issue of a writ *de lunatico inquirendo*, a mortgage executed by the guardian in conjunction with the husband, was held not to bind the wife. The appointment of the guardian was declared void; "were it otherwise," said the judge who delivered the opinion of the court, "I apprehend the guardian of a lunatic wife can have no authority to relinquish her dower in the real estate of her husband."²

The wife may recall her assent before delivery of the deed.

36. At common law, if a contract of sale were entered into by the owner of an estate of which the wife was dowable, and a fine was to be levied to extinguish the title to dower, and the husband died before the essential ceremonies were completed, the wife might intervene and prevent their completion, and thus protect her dower, even though she had joined in acknowledging the fine.³ Upon the same principle, it has been held in the American courts, that a married woman who has executed and acknowledged a deed in due form, may revoke her assent at any time before the deed has been delivered.⁴ But where a conveyance which had been signed, sealed, and acknowledged by husband and wife, was sent by the former, in the presence of the latter, to be recorded, no objection being made on her part, this was held to be such a delivery as would bind the wife.⁵ So where a deed regularly executed and acknowledged by husband and wife, is delivered by the husband, without the knowledge of the wife, and is accepted by the grantee, acting in good faith, and without notice of her dissent, she is bound by such delivery.⁶

¹ *Ex parte McElwain*, 29 Ill. 442.

² *Eslava v. Lepretre*, 21 Ala. 504.

³ *Hody v. Lunn*, 1 Roll. Ab. 375, pl. 20; *Park, Dow.* 201; 1 *Roper*, H. & W. 540. See post, §§ 53-56.

⁴ *Leland's Appeal*, 13 Pa. St. (1 Harris), 84, 85.

⁵ *McNeely v. Rucker*, 6 Blackf. 391. Upon the subject of the delivery of deeds, see 2 Washb. R. P., 2d ed., p. 602, *et seq.*

⁶ *Baldwin v. Snowden*, 11 Ohio Si. 203.

In what cases the release is not an absolute bar.

37. A release is not necessarily an absolute bar of dower. If it be executed for a particular purpose, as to raise a term of years, or to create a charge upon the estate, its operation will be restricted to that purpose; and dower will be barred to the extent only, and as against the owner of, the particular interest so created.¹

38. If the wife join her husband in a mortgage of his estate, she is still dowable of the mortgaged premises, subject to the lien and rights of the mortgagee.² If she join in a lease, and no rent be reserved, she is entitled to dower subject to the term;³ if rent be reserved, she is dowable of the rent as well as of the reversion.⁴ So if a widow, as administratrix, convey her husband's estate in pursuance of an order of court, her right of dower will not pass by the deed.⁵ Nor will her deed as guardian, conveying the interest of her ward, and limited by fair construction to that interest, transfer her right of dower.⁶ So a release of dower in one moiety of a farm will not operate in law as a release of it in the other moiety; nor does a release of it to one tenant in common for

¹ Park, Dow. 196, 207; 1 Roper, H. & W. 537; Chase's case, 1 Bland, Ch. 206, 228.

² Vol. i., chapters xxii., xxiii., xxiv. A release of dower in a mortgage deed works an estoppel, not only in favor of the mortgagee and the direct assignees of the mortgage, but of those who become entitled by equitable substitution to its benefits. Dearborn v. Taylor, 18 N. H. 153.

³ Vol. i., ch. xviii., § 7.

⁴ Vol. i., ch. xviii., § 6; Hall v. Hall, 2 McCord's Ch. 280; Chase's case, 1 Bland's Ch. 206, 231.

⁵ Shurtz v. Thomas, 8 Barr, 359; Ritchie v. Putnam, 13 Wend. 524. See Dougrey v. Topping, 4 Paige, 94. But if she give personal covenants for title, she will be estopped from claiming dower. See ante, ch. xi., §§ 21-29. Where a deed purports to be a relinquishment of dower only, as to the wife, it will not pass her separate estate in the inheritance. McDaniel v. Priest, 12 Misso. 544; Tevis v. Richardson, 7 Mon. 655; Barnett v. Shackleford, 6 J. J. Marsh. 532; Miller v. Shackleford, 3 Dana, 289; Flagg v. Bean, 5 Foster (N. H.), 49; Hughes v. Wilkinson, 21 Ala. 296; Mayo v. Feaster, 2 McCord's Ch. 137; Raymond v. Holden, 2 Cush. 264; Still v. Swan, Litt. Sel. Cas. 155; Foster v. Dennison, 9 Ohio, 121. In Missouri, the right of a widow to two hundred dollars worth of personal property under § 30, art. 2, of the Administration Act, (R. C. 1845, p. 77), will pass by a deed of the widow relinquishing to the administrator of her deceased husband's estate, all her "right, title, and interest of dower in said estate" McFarland v. Boze, 24 Misso. 156. If the wife join in the granting part of a deed which also contains a release of dower, it will pass her separate estate. Perkins v. Richardson, 11 Allen, 538. And in the absence of fraud, a mortgage on the lands, held by her in her own right will be extinguished. Gregory v. Gregory, 16 Ohio St.

⁶ Jones v. Holloper, 10 S. & R. 326. See ch. xi., §§ 21-29.

his share, operate as a release of it to another tenant in common who has a different share.¹ But if a woman join her second husband in a conveyance of real estate for the purpose of relinquishing her dower therein, she is estopped to claim dower in the same estate, under her former husband.²

When the execution of a release may be presumed.

39. In North Carolina, it has been more than once intimated, that a release, if properly pleaded, might be presumed against a widow who had failed to claim her dower for twenty years or more.³ In New Hampshire, where a right of dower accrued to a widow in 1797, but she neglected to make any claim until in 1826, such neglect was held to be competent evidence to be submitted to a jury as proof of the release of her right, although she married again in 1798, and remained a *feme covert* during the residue of the time, and had resided out of the State during the whole time.⁴ But a release of dower will not be presumed from long continued occupation of the premises, where such occupation was adverse to the husband.⁵

*Release to stranger no bar of dower.*⁶

40. It is well settled that it is no defence to an action of dower, that the widow has released her right to a stranger.⁷ In an early case in Massachusetts in which the defence was that the demandant had executed a release to a third person, the court said: "The deed relied on to bar the demandant shows no privity of estate, or

¹ *White v. White*, 1 Harrison, 202. ² *Usher v. Richardson*, 29 Maine, 415.

³ *Spencer v. Weston*, 1 Dev. & Bat. L. 213; *McMillan v. Turner*, 7 Jones, L. 435.

⁴ *Barnard v. Edwards*, 4 N. H. 321. And see *Evans v. Evans*, 3 Yeates, 507.

⁵ *Durham v. Angier*, 20 Maine, 242.

⁶ "In dower, the tenant pleads release of the demandant made to such a tenant in *possessione tenementorum prædictorum existent*. And because he doth not say that he was *tenens liberi tenementi*, it was held to be no plea; and adjudged for the demandant." Anon. Cro. Jac. 151. See Co. Litt. 266 a.; Litt. § 495; post, § 52.

⁷ *Pixley v. Bennett*, 11 Mass. 298; *Robinson v. Bates*, 3 Met. 40; *Littlefield v. Crocker*, 30 Maine, 192; *Harriman v. Gray*, 49 Maine, 537; *Taylor v. Fowler*, 18 Ohio, 567; *Woodworth v. Paige*, 5 Ohio St. 70; *Kitzmiller v. Van Rennselaer*, 10 Ohio St. 63; *Blain v. Harrison*, 11 Ill. 384; *Summers v. Babb*, 13 Ill. 483; *Gove v. Cather*, 23 Ill. 634; *Harrison v. Eldridge*, 2 Halst. 392; *Rickard v. Talbird*, Rice, Eq. R. 158; *Pinson v. Williams*, 23 Missis. 64; *Randolph v. Doss*, 3 How. (Missis.), 205; *Gray v. McCune*, 23 Pa. St. 447, 451. See *Carter v. Walker*, 2 Ohio St. 339.

connection of any kind between her and the tenant. It can not avail the tenant in this action."¹

41. In a case where lands had been mortgaged by the husband during coverture, his wife not joining; and subsequently the husband and wife united in a conveyance of the equity of redemption to a third person; and after breach of the mortgage there was a foreclosure and sale; it was held, that the widow was entitled to dower as against a purchaser under the decree, he not connecting himself in any manner with the conveyance of the equity.² So where husband and wife, after the recovery of a judgment against the husband, and while it was a lien upon his lands, joined in a conveyance containing full covenants of warranty and a release of dower, and the grantee entered and occupied under the deed, but was afterwards evicted by a purchaser at sheriff's sale under the judgment, it was held that the latter could not make the conveyance and release available for his protection against the claim of dower, either as a grant, or as an estoppel.³ So where lands had been mortgaged to secure the payment of a debt, the wife having joined in the mortgage, and subsequently the lands were sold under a judgment against the husband, at the suit of a stranger to the mortgage, it was determined, that as against the purchaser at such sale, the wife was not divested of her dower.⁴ The result will be the same if the mortgagee proceed at law and sell the mortgaged premises under ordinary judgment and execution, instead of foreclosing his mortgage. The purchaser under such a judgment can not be said to be in privity with the mortgage, and therefore is not protected against dower.⁵ Upon the same principle, if husband and wife execute a deed of trust, and the lands are afterwards sold in satisfaction of a mechanic's lien subsisting at the date of the deed, the purchaser takes the premises subject to dower.⁶ But where the husband alone mortgaged his estate, and afterwards joined with his wife in a conveyance to a third person, it was held that a purchaser under proceedings in foreclosure founded on the mortgage, the grantee of the husband and wife having been made a party to the proceedings, acquired all the title of the mortgagor and the grantee,

¹ *Pixley v. Bennett*, 11 Mass. 298.

² *Littlefield v. Crocker*, 30 Maine, 192.

³ *Kitzmiller v. Rensselaer*, 10 Ohio St. 63.

⁴ *Taylor v. Fowler*, 18 Ohio, 567.

⁵ *Harrison v. Eldridge*, 2 Halst. 392. See, also, post, § 50.

⁶ *Gove v. Cather*, 23 Ill. 634. See vol. i., ch. xxix., § 45.

and held the property discharged of dower.¹ And where a widow executed, with the proper formalities, an instrument of writing addressed in general terms, "To all to whom these presents shall come," containing, in substance, a release of dower, and delivered it to a person in possession of lands under a conveyance from her husband, and it appeared from the circumstances that the writing was intended as a release of dower in the lands so held, the party receiving it will not be regarded as a stranger in the transaction, but may avail himself of the release against a claim for dower subsequently set up by the widow.²

42. If the party to whom the wife makes a valid release of dower, afterwards acquire title to the lands, the release operates to bar the dower as to him, by way of estoppel.³ And if, after a mortgage by the husband alone, the wife join with him in a conveyance to a third person, and the grantee reconvey to the husband, the wife is dowable of the equity of redemption only. In such case, all the right which she has is derived from the reconveyance, and as that vests in the husband nothing but the equity, her dower is limited accordingly.⁴ But a release of dower to a person who has parted with his title by deed of quit-claim merely, without covenants of warranty, does not inure in favor of his grantee.⁵

Release to husband.

43. It is a well established rule of the common law, that a wife can not relinquish her dower in the real estate of her husband by executing a release to him, nor in any other way than by joining with him in a conveyance to a third person.⁶ Even an agreement made during coverture, between a husband, his wife, and a trustee of the latter, that in consideration of her enjoying separately and absolutely controlling her separate property, she would relinquish her dower in his lands, is invalid, and can not be enforced against her in an action for her dower.⁷

¹ Carter v. Walker, 2 Ohio St. 339. See, however, Littlefield v. Crocker, *supra*.

² Gray v. McCune, 23 Pa. St. 447.

³ Harriman v. Gray, 49 Maine, 537.

⁴ Hoogland v. Watt, 2 Sandf. Ch. 148.

⁵ Harriman v. Gray, 49 Maine, 537.

⁶ Carson v. Murray, 3 Paige, 483; Rowe v. Hamilton, 3 Greenl. 63; Martin v. Martin, 22 Ala. 86; Townsend v. Townsend, 2 Sandf. S. C. 711; Crain v. Cavana, 36 Barb. 410.

⁷ Townsend v. Townsend, 2 Sandf. S. C. 711. See Martin v. Martin, 22 Ala. 86; Walsh v. Kelly, 34 Pa. St. 84; post, ch. xv.

44. It is held in New York, that a court of chancery has not, by virtue of its equity jurisdiction, authority in a divorce suit, to require a married woman to accept a gross sum from her husband in satisfaction of her dower. Nor will the acceptance by her of such sum in the lifetime of her husband, defeat her right. And her release to her husband pursuant to an order of the court, though acknowledged in due form, would be a nullity, she being legally incompetent to execute such an instrument to her husband except in cases where it is specially authorized by statute.¹ But it is intimated in a Wisconsin case,² that a wife suing for a divorce, may stipulate with her husband that she will release all right of dower in his lands; and that a decree predicated upon such agreement would be binding.

45. It is an unsettled question in some of the States, whether the statutes before referred to,³ enlarging the powers of married women, do not authorize a *feme covert* to convey her estate or relinquish her dower directly to her husband. The New York statute of 1849 contains the following provision:

Any married female may take by inheritance, or by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues, and profits thereof, in the same manner and with like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband, nor be liable for his debts.⁴

In *Graham v. Van Wyck*,⁵ a question was made as to the proper construction of this enactment. It was insisted in that case that a release of dower executed by a wife to her husband, was valid; but the court determined otherwise, holding that the safer and more reasonable construction of the Act was to restrict the right of a married woman to convey to persons other than her husband. In 1860, the same question was again raised in the supreme court, and decided by a majority of the judges in the same way. The court held, that the disability of the wife was not the mischief the statute intended to remedy, but that the Act was, as its title imported, designed for the protection of married women, and that to put it

¹ *Crain v. Cavana*, 36 Barb. 410.

² *Burdick v. Briggs*, 11 Wis. 126. See, also, *Blake v. Blake*, 7 Iowa, 46.

³ Ante, § 22.

⁴ Act of 1848, ch. 200, § 3, as amended 1849, ch. 375, § 1; 3 N. Y. Rev. Stat. 5th ed., p. 240, § 77. See, also, the Act of 1860, as amended in 1862, ch. 172, p. 343;

⁵ 4 Rev. Stat. N. Y. 5th ed. (Supp.) p. 697, § 3.

⁶ *Graham v. Van Wyck*, 14 Barb. 531, (1851).

in her power to convey directly to her husband was not a provision calculated to promote this end; and that, as by the statute the husband was restricted from conveying to the wife, the intention of the legislature was also to retain the corresponding common law disability which restricted the wife from conveying to the husband; and that where the intent was doubtful, the consequences were to be regarded.¹ About six months later, the question was again raised in another judicial district of the supreme court, and the judges were unanimously of the opinion that a married woman could make a valid conveyance to her husband, and one which would bind her heirs. The language of the Act was declared to be so clear and explicit, that there was no room for interpretation or construction; that the court had no right to infer that the broad and comprehensive language of the Act did not confer on married women this power, because they (the court) did not think it wise for them so to do; that, as the legislature had in express terms limited the wife's power of taking, if they had intended any restriction upon her power of alienation they would have been equally explicit upon that point; that the Act aimed to enlarge the powers of the wife, and that the theoretical unity of husband and wife was entirely dissolved by it.² The question was carried to the court of appeals, and it was there settled, that a conveyance by the wife to the husband is not authorized by the statute.³ It was declared, however, that the validity of such a conveyance might be established by the application of principles of equity where a consideration had been paid; and also where the grantee is entitled to equitable relief for improvements made upon the premises in good faith, to the extent of such equitable claim.⁴

46. The Pennsylvania courts, in interpreting their statute, have, as we have seen,⁵ come to a conclusion similar to that reached in New York, and have been very decided in the expression of their opinion. "We hold," say the court in *Bear v. Bear*,⁶ "that the

¹ *White v. Wager*, 32 Barb. 250.

² *Winans v. Peebles*, 31 Barb. 371; *North Amer. Review*, No. 204, (July, 1864), pp. 34, 57. See, also, *Cruger v. Cruger*, 5 Barb. 225; *Voorhees v. Presb. Church*, 17 Barb. 104; *Simmons v. McElwain*, 26 Barb. 419; *Wallace v. Basset*, 41 Barb. 92; *Kolls v. De Leyer*, *Ibid.* 208; *Porter v. Mount*, *Ibid.* 561; *Goss v. Cahill*, 42 Barb. 310; and additional cases cited ante, note to § 22.

³ *White v. Wager*, 25 N. Y. 328; *Winans v. Peebles*, 32 N. Y. 423.

⁴ *Winans v. Peebles*, 32 N. Y. 423.

⁵ Ante, §§ 18, 22.

⁶ *Bear v. Bear*, 33 Pa. St. 525.

Act protected the wife's property against her husband's creditors by protecting it against him. What would the protection be worth, if it made her a *feme sole*, authorized her to enter into contracts with him, and to assume pecuniary obligations to him? How long would her property remain secured to her? Such parties can not deal on equal terms. A wife is even more defenceless than is a ward dealing with his guardian." In another case the court say: "We have gone very far in the way of statutory enfranchisement of married women. Almost all the disabilities, and with them the securities, of the common law, are taken from her; and if legislation goes on according to its modern tendencies, she will be left before long entirely competent to contract on her own account, and entirely exposed, therefore, to all the importunities, intrigues, and frauds which her husband or others may be disposed to practice. What will the Act of 1848 be worth to her, when she recovers her coveted freedom to alien and encumber her estate at pleasure."¹

47. It has been held in Iowa, under the code of that State, that a married woman may convey directly to her husband, or release to him her interest in his real estate.² "She is also given," said the court, "full power to convey her interest in real estate in the same manner as other persons; and can receive gifts and grants of property from her husband without the intervention of trustees. . . . If she conveys her interest in real estate to the husband, or if she shall release to him an inchoate right in his estate, for a consider-

¹ Hengh v. Jones, 32 Pa. St. 432. See North Amer. Review, No. 204, (July, 1864), pp. 34, 57-8. That portion of the Pennsylvania statute which bears upon the question discussed in the text is as follows: "Every species and description of property . . . which may be owned by, or belong to, any single woman, shall continue to be the property of such woman as fully after her marriage as before; and all such property, of whatever name or kind, which shall accrue to any married woman during coverture by will, descent, deed of conveyance, or otherwise, shall be owned, used and enjoyed by such married woman as her own separate property," &c. Purdon's Dig. by Brightly, p. 699, § 11. In a note to Emerson v. Clayton, 3 Amer. Law Reg. N. S. pp. 530, 534, it is said: "The first impression of the courts, in the construction of this Act, was that it made a radical change in the condition of a *feme covert*, and gave her, in all respects that concerned her property, the full rights and privileges of a *feme sole*, and there are many *dicta* to that effect. Cummings' Appeal, 1 Jones, 272; Goodyear v. Rumbaugh, 1 Harris, 480; Sheidle v. Weishlee, 4 Id. 138, &c. The subsequent cases, however, have not been disposed to give the Act so wide a scope, and have been adverse to a married woman's possession of many powers claimed for her under it" For a further expression of opinion upon this subject, consult the authorities cited ante in note to § 18.

² Blake v. Blake, 7 Iowa, 46.

ation just and adequate, untainted by fraud, circumvention, or improper influences, it seems to us that in equity she is bound by it. Having the power to convey her real estate in the same manner as other persons, no reason is perceived why she might not convey it to her husband, and in return, or in consideration thereof, she receive from him a grant or conveyance of other property. If so, why may she not, for a money consideration, make or execute a release of her interest in his real estate?"

48. In a Michigan case¹ involving a question as to the power of a married woman to convey her separate estate without the concurrence of her husband, the court, in giving a construction to the statute of that State, observed: "The land in question being the property of the defendant at the time of the conveyance by her to Parrish, she had power, under the Act of 1855,² to sell and convey it 'in like manner and with the like effect as if she were unmarried.' The obvious intention of the Act of 1855 was to give to a *feme covert* the same control over and power of alienation of her property as she would have if a *feme sole*; and the husband's assent is no longer necessary to render valid a conveyance by her of her separate estate, as against herself. Whether the husband, if living with her, or surviving her, may not have rights adverse to the claim of her vendee to possession, and superior to that claim during the life of such husband, is a question not involved in this case; certainly no one but the husband can dispute the plaintiff's title."³ It does not appear to have been decided, however, that a deed, or release by the wife to the husband, is good; in one case a doubt was expressed as to the power of the wife to receive a valid conveyance directly from her husband.⁴

If the deed of the husband be avoided dower is restored.

49. A wife who joins with her husband in a conveyance of his lands, is not a party thereto except for the purpose of relinquishing her dower. She is not to be regarded as alienating a real subsisting estate, but as releasing a future contingent right. Her renunciation of dower is to attend the conveyance of her husband;

¹ Farr v. Sherman, 11 Mich. 33.

² Sess. Laws, 1855, p. 420.

³ See, also, Brown v. Fifield, 4 Mich. 322; Starkweather v. Smith, 6 Mich. 377; Watson v. Thurber, 11 Mich. 457; Amperse v. Burdendo, 14 Amer. Law Reg. 275.

⁴ People v. Horton, 4 Mich. 67. See Fritz v. Fritz, 23 Ind. 388; Baxter v. Bodkin, 25 Ind. 172.

to endure while that endures, and no longer.¹ Hence, if the conveyance of the husband be inoperative, or if it be set aside, or avoided, the right of dower remains unimpaired.²

50. It is upon this principle that dower is restored where a conveyance in which the wife has joined, is set aside as fraudulent as to the creditors of the husband.³ And in a case where lands were sold on execution, and before the expiration of the time for redemption, the judgment debtor and his wife executed a mortgage upon the same lands, but the premises were not redeemed, and the purchaser received a sheriff's deed, it was decided that the right of dower was not barred by the execution of the mortgage, because the estate mortgaged was extinguished by the failure to redeem from the prior sale.⁴ So where the wife relinquished her dower by joining her husband in a deed containing the usual covenants; and the grantee afterwards recovered judgment and satisfaction against the husband for an alleged breach of his covenants "that he was lawfully seized and had good right to convey;" it was held that such deed could not be made use of to bar the wife of her dower in the lands. "The estate," the court said, "did not pass from Parsons to Hinkley, as appears by his own allegations and proceedings; and the relinquishment of dower by the wife can not now avail, since there is no estate for it to operate upon."⁵ So where a widow who was administratrix of her husband's estate, surrendered her dower in part satisfaction of a claim asserted against the estate, and the settlement was afterwards set aside at the instance of the creditor, it was held that the right to dower was thereby revived.⁶

Release after the husband's death.

51. After the death of the husband, the right of dower may be

¹ Clowes v. Dickenson, 5 John. Ch. 235, 246; Douglass v. McCoy, 5 Ohio, 522, 527; Blain v. Harrison, 11 Ill. 384; Rickard v. Talbird, Rice, Eq. R. 158; Fisher v. Grimes, 1 Smedes & Marsh. Ch. 107. See Davison v. Waite, 2 Munf. 527; ante, chapters i. and ii.

² Rickard v. Talbird, Rice, Eq. R. 158; Robinson v. Bates, 3 Met. 40; Stinson v. Sumner, 9 Mass. 143; Blain v. Harrison, 11 Ill. 384; Summers v. Babb, 13 Ill. 483; Woodworth v. Paige, 5 Ohio St. 70.

³ Robinson v. Bates, 3 Met. 40; Woodworth v. Paige, 5 Ohio St. 70; Summers v. Babb, 13 Ill. 483. See vol. i., ch. xxx.

⁴ Blain v. Harrison, 11 Ill. 384. And see ante, § 41.

⁵ Stinson v. Sumner, 9 Mass. 143.

⁶ Pinson v. Williams, 23 Missis. 64.

extinguished by release to the terre-tenant.¹ But there is a distinction between the release by the widow of her right of dower, and the release of her action of dower; for if she release her right of dower, it will be a bar whether it be made to the tenant of the freehold, or to the person in reversion. But if the release be of all "actions of dower," or of "all actions real," and such release, instead of being made to the tenant of the freehold, is granted to the person in reversion, it will not bar the right to endowment. The reasons upon which this distinction is founded will appear in a supposed case, stated by way of example on each form of release.

52. If a widow entitled to dower out of lands limited to B. for life with remainder to C. in fee, release all her right to C., and afterwards implead B. for dower, he may take advantage of the release to C.; and so would C. after B.'s death, be allowed the benefit of a similar release to B.; because the right to dower arises out of both the estate for life and that in reversion; and when the *jus habendi*, which is the principal, is released, it follows that the action, which is but the instrument to recover it, is also gone.² But if the release to C. were not of the right, but of the action, it would not extinguish the dower; for the widow would have no right of action against C., but against B. only; and an action of dower being a real action, can only be released like other real actions, to the tenant of the freehold.³ Therefore, as the widow could not sue C. for dower, he not being tenant of the freehold, if B., who was such tenant, were to plead to the writ the release to C., her replication that C. had nothing in the freehold at the time of the release, would be sufficient to avoid the plea; it being an established rule, that in order to give validity to a release of actions real, the releasee must be tenant of the freehold, either in deed or in law.⁴ It is necessary in a plea of such a release, to aver that the person to whom it was made was *tenens liberi tenementi*.⁵

¹ Park, Dow. 212; 1 Roper, H. & W. 563; Shep. Touch. 328; Altham's case, 8 Co. 151; Thatcher v. Howland, 2 Met. 41; Gray v. McCune, 23 Pa. St. 447; Matlock v. Lee, 9 Ind. 298. Nor is it any answer to a plea of release that an order was given for the consideration of the release, upon a third person, who did not accept or pay it. Matlock v. Lee, 9 Ind. 298. See ante, ch. ii.

² Co. Litt. 265 a., 267 b.; 1 Rep. 112 b.; 8 Rep. 151 b.

³ Litt. § 495. See ante, ch. v., § 3.

⁴ Altham's case, 8 Co. 150, 151 b.

⁵ Anon. Cro. Jac. 151, quoted ante, § 40, note; Park, Dow. 213; 1 Roper, H. & W. 563-5.

*Defective conveyance executed during coverture can not be reformed
as to the wife.*

53. In England, a great diversity of opinion has existed as to the effect of the husband's covenant or agreement that the wife should join with him in levying a fine, and whether a court of equity would compel a specific performance of such covenant or agreement.¹ Formerly, it was almost uniformly held, that specific performance would be decreed against the husband, although the wife should refuse to join in levying a fine. In Tothill's Reports, there are several decrees of this nature;² and in *Hall v. Hardy*,³ Sir Joseph Jekyll said "there have been a hundred precedents, where, if the husband, for a valuable consideration covenants that the wife shall join with him in a fine, the court has decreed the husband to do it, for that he has undertaken it, and must lie by it if he does not perform it." And it would seem from the language of the reporter, that in some instances decrees were made against the wife, personally.⁴ In one case, it was decreed that a man should compel his wife and another man's wife, to levy a fine.⁵ In another, it is said to have been held, that if a *feme covert* agree with her husband to levy a fine, she shall, after his death, be compelled to perform the agreement.⁶ This extreme doctrine, however, is modified by later decisions. "Since the limits of the jurisdiction of equity in the specific performance of agreements, and the rules as to the disabilities of coverture have been more clearly settled," Mr. Jacob observes, "these early cases can not now be received as authorities without some qualifications."⁷ There are, however, many cases in the English reports tending to establish the general proposition, that the husband is bound in equity to perform his covenant, founded upon a valuable consideration, to procure his

¹ 1 Roper, H. & W. 540; Park, Dow. 202.

² Haddon's case, Toth. 205; Griffin v. Taylor, Ibid. 106; Barty v. Herenden, Ibid. 156; Sands v. Tomlinson, Ibid. 157. If the husband failed to perform according to the decree, he was compelled to suffer imprisonment by way of penalty.

³ Hall v. Hardy, 3 P. Wms. 187, (1733).

⁴ Barty v. Herenden, Toth. 156; Sands v. Tomlinson, Ibid. 157.

⁵ Rust v. Whittle, Toth. 94.

⁶ Baker v. Child, 2 Vern. 61.

⁷ 1 Roper, H. & W, 545, 546, note.

wife to join with him in a fine or other conveyance,¹ and Mr. Roper states this to be the law.²

54. But in other decisions, this doctrine is denied. According to Gilbert, if a purchaser file a bill against the husband and wife for a specific execution of the agreement, and the wife, upon private examination, consent, the courts will decree it: "But *quære* whether the court will decree it if the bill be preferred against the husband only; because, if the court should compel the husband, the husband would compel the wife who is under his power, and the wife ought not by law to convey by means of any compulsion from her husband."³ In *Emery v. Wase*,⁴ Lord Eldon said that the point was not quite so well settled as it had been understood to be. That if it were perfectly *res integra*, he would hesitate long before he would say that the husband was to be understood to have gained the wife's consent. "If a man chooses," he said, "to contract for the estate of a married woman, or an estate subject to dower, he knows the property is hers altogether, or to a given extent. The purchaser," he added, "is bound to regard the policy of the law, and what right has he to complain if she who according to law can not part with her property but by her own free will, expressed at the time of that act of record, takes advantage of the *locus penitentiae*; and why is he not to take his chance of damages against the husband?" In the case of *Davis v. Jones*,⁵ on an action being brought on a covenant by the husband, that he and his wife would levy a fine, and he could not procure her concurrence, Chief Justice Mansfield said that nothing could be more absurd than to allow a married woman to be compelled to levy a fine through the fear of her husband being sued and thrown into jail, when the general principle of

¹ In addition to the cases before cited, see *Barrington v. Horn*, 5 Vin. Abr. 547, pl. 35; 2 Eq. Ca. Ab. 17, pl. 7; *Withers v. Pinchard*, cited 7 Ves. Jr. 475; *Morris v. Stephenson*, 7 Ves. Jr. 474; *Berry v. Wade*, Finch, 180; *Voux v. Gleas*, Toth 92; *Wheeler v. Newton*, 2 Eq. Ca. Ab. 44, pl. 5; *Prec. Ch.* 16; *Clark v. Greenhill*, 1 Dick. 91.

² 1 Roper, H. & W. 542, 545.

³ *Lex Proet.* 245.

⁴ *Emery v. Wase*, 8 Ves. Jr. 514.

⁵ *Davis v. Jones*, 1 Bos. & P. N. R. 269. See, also, *Otread v. Round*, 4 Vin. Ab. 203, pl. 4; *Bryan v. Woolley*, 1 Bro. Parl. Cas. Toml. 184; 4 Vin. Ab. 57, pl. 19; 1 Madd. 7, note; *Daniel v. Adams*, Ambl. 495; *Martin v. Mitchell*, 2 J. & W. 425; *Howell v. George*, 1 Madd. 1; *Innes v. Jackson*, 16 Ves. Jr. 367; *Frederick v. Coxwell*, 3 You. & J. 514; *Emery v. Wase*, 5 Ves. Jr. 848; *Lloyd v. Basnet*, 1 Dick. 143; *Barry v. Cone*, 3 Madd. 472; *Sedgwick v. Hargrave*, 2 Ves. Sen. 56; *Jacob's note*, 1 Roper, H. & W. 545; 1 Bright, H. & W. ch. 11, § 4; *Park, Dow.* 202-206.

the law was, that a married woman was not compellable to levy a fine. And this doctrine has been applied to quite a recent case.¹

55. In the United States, the rule is well settled, that an agreement to convey entered into by the husband alone, or by the husband and wife jointly, can not be specifically enforced against the wife.² It was stated by the court in *Atwater v. Buckingham*,³ to be a fundamental principle of the common law, that the contract of a *feme covert* is absolutely void, except where she conveys her estate by fine duly acknowledged, or by some matter of record, when she is privately examined in order to ascertain whether the conveyance is voluntary on her part;⁴ and it was pertinently remarked that it would be absurd to enforce a contract to convey, made without such an examination. It would be saying that a *feme covert* can not directly convey lands unless she is privately examined, and yet that she can contract to convey without such examination, and such contract will be enforced against her. By this mode the established law in relation to a *feme covert* and her real estate would be completely subverted.

56. Nor can a deed defectively executed, nor an omission or mistake as to the parties, nor a misdescription of the premises, be reformed or corrected as to the wife. Thus, a deed not acknowledged by the wife pursuant to the statute;⁵ or in which the name of the grantor is omitted;⁶ or which does not include lands intended to be embraced,⁷ can not be set up in equity so as to affect the

¹ *Jordan v. Jones*, 2 Ph. 170; 16 Law J. N. S. Chan. 93; 10 Jurist, 1067. By statute in England, the husband may now convey his lands free from his wife's dower. 3 & 4 Will. IV., ch. 105; vol. i., Appendix.

² 2 Kent, 141; *Atwater v. Buckingham*, 5 Day, 492; *Martin v. Dwelly*, 6 Wend. 9; *Wiswall v. Hall*, 3 Paige, 313; *Carr v. Williams*, 10 Ohio, 305; *Purcell v. Goshorn*, 17 Ohio, 105; *Davenport v. Sovil*, 6 Ohio St. 459; *Roseburgh v. Sterling*, 27 Pa. St. 292; *Richmond v. Robinson*, 12 Mich. 193; *Teviss v. Richardson*, 7 Mon. 655. But where an intestate left lands subject to a contract to convey them, and the widow submitted her rights to the court by petition, stating her willingness to release dower, it was held that as she had placed herself within the power of the court, it could compel her to release the dower, and direct a third of the price to be set apart for her benefit. In the Matter of Hunter, 1 Edw. Ch. 1. See *McCall v. McCall*, 3 Day, 402, and comments thereon in *Carr v. Williams*, 10 Ohio, 305, 310.

³ *Atwater v. Buckingham*, 5 Day, 492.

⁴ See post, ch. xiii.

⁵ *Martin v. Dwelly*, 6 Wend. 9. See post, ch. xiii.

⁶ *Carr v. Williams*, 10 Ohio, 305; *Purcell v. Goshorn*, 17 Ohio, 105.

⁷ *Davenport v. Sovil*, 6 Ohio St. 459; *Wiswall v. Hall*, 3 Paige, 313. See, also, *Grapengether v. Ferjavy*, 9 Withrow (Iowa), 163; *Green v. Branton*, 1 Dev. Eq. 504.

wife.¹ Nor will the fact that the error or omission is produced by the fraud of the husband make any difference in this respect, unless, indeed, the wife is an actual participant in the fraud.² And in Ohio it has been said that the fraud of the wife in the transaction furnishes no ground for compulsory action on the part of a court of equity.³

¹ But it has been held in the Superior Court of New York, that a mistake in the name of the grantee may be corrected as against the wife. *Hensing v. O'Neills*, Sup. Court, April, 1864, 26 Law Reporter, 595. In Ohio, by the Act of March 22, 1849, (Swan's Stat., ed. 1854, p. 314), the courts are authorized to correct mistakes or defects in the deeds of married women. But by its terms, this Act applies only to deeds executed after its passage. *Davenport v. Sovil*, 6 Ohio St. 466. It was afterwards so amended as to apply to deeds previously executed. Act of April 17, 1857; 1 Swan & Critchf. 694. A similar provision has been adopted in Iowa. Laws Iowa, Rev. 1860, § 2257.

² *Wiswall v. Hall*, 3 Paige, 313. See vol. i., ch. xxx., § 10.

³ *Purcell v. Goshorn*, 17 Ohio, 105, 124. To the same effect, *Green v. Branton*, 1 Dev. Eq. 504. See *Raymond v. Holden*, 2 Cush. 264; 1 Story's Eq. § 385.

CHAPTER XIII.

PRIVY EXAMINATION AND ACKNOWLEDGMENT OF THE WIFE.

§ 1. Privy examination and acknowledgment at common law.

2. Privy examination and acknowledgment in the United States.

3-5. The officer taking the acknowledgment must be disinterested.

6. Proof of the genuineness of the certificate not required.

7-44. Requisites of a valid certificate.

45. Parol evidence inadmissible to show a proper acknowledgment.

46, 47. Defective acknowledgment not aided in equity.

48. Re-acknowledgment of deed defectively certified.

49. Re-delivery after husband's death of deed defectively acknowledged.

50-59. Certificate of the officer not conclusive.

Privy examination and acknowledgment at common law.

1. THE statute *de modo levandi fines*,¹ required, that where a married woman was made party to a fine, she should first be examined by the justices, to ascertain her consent; and this private examination was used, as well where the woman joined in a fine to extinguish her dower, as where it was levied as a conveyance of her estate.² And although fines only were mentioned in the statute, yet it was the usage in the time of Lord Coke, when a common recovery was suffered by husband and wife, to examine the wife, and to grant a *dedimus potestatem* to take her acknowledgment upon examination, as in case of a fine.³ Fines and recoveries are

¹ 18 Edw. I.; 2 Inst. 515.

² "The examination of a *feme covert* ought to be secret; and the effect is to examine her whether she be content to levie a fine of such lands, (naming them particularly and distinctly, and the state that passeth by the fine) of her own voluntary free will, and not by threats, menaces, or any other compulsorie means." Co. Litt. 353 a.; 2 Inst. 515. "If there be any woman that hath a husband among the conusors in the fine, they do examine her whether she be willing and do it freely without compulsion of her husband." Shep. Touch. 5. See Vin. Ab. Fine, (F. M.); 1 Prest. Conv. 265.

³ 10 Co. 43 a.; Park, Dow. 194. It is said by one author that in common recoveries, this practice had fallen into disuse. Pigott, Recov. 66. See, also, 5 Mod. 210. But this has been denied. Park, Dow. 194.

now abolished in England by statute 3 & 4 Will. IV., c. 74, and conveyance by deed substituted in their stead. By this statute the deed of a married woman must be acknowledged on a separate examination.

Privy examination and acknowledgment in the United States.

2. In Massachusetts,¹ Maine,² New Hampshire,³ and Connecticut,⁴ no privy examination or acknowledgment of the wife is required to give validity to her deed. It is sufficient if it be acknowledged by the husband alone.⁵ In Indiana, by the present statute, no distinction is made, in the acknowledgment of deeds, between married women and persons who are unmarried;⁶ but under former statutes, the separate examination of a married woman was indispensable.⁷ In Wisconsin⁸ and Kansas,⁹ married women may convey their interests in real estate in the same manner as other persons. In Michigan,¹⁰ Minnesota,¹¹ and Oregon,¹² the law is the same as to *femes covert* who reside out of the State. In most of the States, the rule of the common law is adopted; and unless the wife, upon a separate examination, acknowledge the execution of the deed to be her voluntary act, it is, as to her, absolutely void. In New York, prior to the statute of February 16, 1771;¹³ in Pennsylvania, before the Act of February 24, 1770;¹⁴ and in Maryland,

¹ *Dudley v. Sumner*, 5 Mass. 438, 454, 463, 479; *Catlin v. Ware*, 9 Mass. 218, 220; *Foster v. Dennison*, 9 Ohio, 121; *Stearns*, Real Act. 288; 1 Washb. R. P., 2d ed., 202; 2 *Ibid.* 581, 585.

² 1 Washb. R. P., 2d ed., 202; 2 *Ibid.* 585.

³ *Ibid.*

⁴ *Ibid.*

⁵ As to the rule in Vermont, see *Thornton*, Convey. 518; 2 Kent, 8th ed., 151, note; *Harmon v. Taft*, 1 Tyler, 6; *Pratt v. Battels*, 28 Verm. 685.

⁶ 1 Ind. Rev. Stat. 1852, p. 236, § 23.

⁷ *Clark v. Redman*, 1 Blackf. 379; *McNeely v. Ruckner*, 6 Blackf. 391; *Stevens v. Doe*, 6 Blackf. 475; *Dawson v. Shirley*, *ibid.* 531; *Davis v. Bartholomew*, 3 Ind. 485. See *Owen v. Norris*, 5 Blackf. 481. If a deed contain several tracts of land, and the wife acknowledge as to but a part, she does not relinquish as to the residue. *Woods v. Polhemus*, 8 Ind. 60.

⁸ Rev. Stat. Wis. 1858, p. 539, § 12.

⁹ Comp. Laws Kansas, 1862, p. 354, § 9. See p. 479, § 8.

¹⁰ 2 Comp. Laws Mich. p. 840, § 13.

¹¹ Stat. Minn. 1858, p. 398, § 13.

¹² Stat. Oregon, 1855, p. 520, § 15.

¹³ 2 Van Schaack, 611; 3 N. Y. Rev. Stat. App. 22; *Jackson v. Gilchrist*, 15 John. 89; *Meriam v. Harsen*, 2 Barb. Ch. 232; *Van Winkle v. Constantine*, 6 Seld. 422; ante, ch. xii., § 10. See *Hunt v. Johnson*, 19 N. Y. 279.

¹⁴ *Purdon's Dig. by Brightly*, p. 311, § 12; *Davey v. Turner*, 1 Dall. 11; *Lloyd v.*

anterior to the law of 1674,¹ no uniform practice seems to have been observed; and deeds were not unfrequently executed by married women without any separate examination. In Pennsylvania, as we have already seen, these early conveyances were sustained by the courts.² In New York and Maryland, as well as in Pennsylvania, healing statutes were enacted, intended to cure defects in such conveyances as were supposed not to be properly acknowledged.³ Since the passage of the Acts above mentioned, a separate examination of the wife has been necessary in New York and Pennsylvania, and until recently, in Maryland, to render her deed valid.⁴ The present statute of Maryland dispenses with the necessity of a private examination.⁵ In Rhode Island since 1798;⁶ in

Taylor, *Ibid.* 17; *Watson v. Bailey*, 1 Binn. 470; *Kirk v. Dean*, 2 Binn. 341; ante, ch. xii., § 11.

¹ Sess. 1674, ch. 2, § 5; *Laws of Maryl.* vol. vii., Appendix; *Chase's case*, 1 Bland, Ch. 206, 230; ante, ch. xii., § 8.

² Ante, ch. xii., § 11; post, § 6.

³ Post, ch. xiv.

⁴ In New York, *Jackson v. Sears*, 10 John. 435, 440; *Jackson v. Gilchrist*, 15 John. 89; *Jackson v. Stevens*, 16 John. 110; *Jackson v. Gumaer*, 2 Cow. 552; *Doe v. Howland*, 8 Cow. 277; *Martin v. Dwelly*, 6 Wend. 9; *Gillet v. Stanley*, 1 Hill, 121; 1 *Hopk. Ch.* 267; *Meriam v. Harsen*, 2 Barb. Ch. 232; *Curtis v. Follett*, 15 Barb. 337; *Elwood v. Klock*, 13 Barb. 50; *Dennis v. Tarpenny*, 20 Barb. 371.

In Pennsylvania, *James v. Lyon*, 3 Yeates, 471; *Jamison v. Jamison*, 3 Whart. 457; *Watson v. Bailey*, 1 Binn. 470; *Kirk v. Dean*, 2 Binn. 341; *M'Intire v. Ward*, 5 Binn. 296; *Shaller v. Brand*, 6 Binn. 435; *Evans v. The Commonwealth*, 4 S. & R. 272; *Thompson v. Morrow*, 5 S. & R. 289; *Jones v. Maffet*, *Ibid.* 523; *Watson v. Mercer*, 6 S. & R. 48; *Fowler v. McClurg*, *Ibid.* 143; *Share v. Anderson*, 7 S. & R. 43; *Jourdan v. Jourdan*, 9 S. & R. 268; *West v. West*, 10 S. & R. 445; *Steele v. Thompson*, 14 S. & R. 84; *Barnet v. Barnet*, 15 S. & R. 72; *Mercer v. Watson*, 1 Watts, 330, 356; *Withers v. Baird*, 7 Watts, 227; *Green v. Drinker*, 7 W. & S. 440; *Schrader v. Decker*, 9 Barr, 14; *Louden v. Blythe*, 4 Harris, 532; s. c. 3 *Casey*, 22; *Stoops v. Blackford*, *Ibid.* 213; *Walsh v. Kelly*, 10 *Casey*, 84; *Kerkland v. Hepselgefer*, 2 *Grant*, 81; *Rumfelt v. Clemens*, 10 *Wright*, 455; *Talbot v. Simpson*, 1 *Peters*, C. C. 188; *McKeen v. Delancy*, 5 *Cranch*, 22; *Hepburn v. Dubois*, 12 *Peters*, 345. The presence of a witness at the time of the separate examination of the wife, does not affect the validity of the deed. *Jones v. Maffet*, 5 S. & R. 523.

In Maryland, *Corporation, &c. v. Hammond*, 1 Har. & J. 580; *Heath v. Eden*, *Ibid.* 751; *Peddicoart v. Rigges*, *Ibid.* 293; *Jacob v. Kraner*, *Ibid.* 291; *Hawkins v. Burress*, *Ibid.* 513; *Partridge v. Partridge*, 2 Har. & J. 62; *Hollingworth v. McDonald*, *Ibid.* 230; *Hammond v. Brice*, 1 Har. & M'H. 322; *Webster v. Hall*, 2 Har. & M'H. 19; *Flanagan v. Young*, *Ibid.* 38; *Ridgely v. Howard*, 3 Har. & M'H. 321; *Lewis v. Waters*, *Ibid.* 430; *Chase's case*, 1 Bland, Ch. 206, 230; *Rhea v. Rhenner*, 1 *Peters*, U. S. 105.

⁵ 1 Md. Code, p. 327, § 11.

⁶ *Dig. Laws R. I.* 1798, p. 267, § 7; *Rev. Stat. R. I.* 1857, p. 316, § 7; p. 317, §§ 9, 11; *Manchester v. Hough*, 5 *Mason*, 67; *Churchill v. Monroe*, 1 *R. I.* 209.

New Jersey since 1743,¹ and in Virginia since 1748,² a separate examination has been required. A privy examination and acknowledgment of the wife is also required in Ohio,³ Kentucky,⁴ Delaware,⁵ Florida,⁶ North Carolina,⁷ South Carolina,⁸

¹ Allinson, 132; *Moore v. Rake*, 2 Dutch. 574, 578; *Sheppard v. Wardell*, Coxe, 452; *Den v. Geiger*, 4 Halst. 225; *White v. White*, 1 Harrison, 202; *Howell v. Ashmore*, 2 Zab. 264. See vol. i., ch. ii., § 9, note.

² 5 Hen. Stat. 410, 411; Code Va. 1849, p. 513, §§ 4, 7; *Harvey v. Borden*, 2 Wash. 156; *Harvey v. Pecks*, 1 Munf. 518; *Countz v. Geiger*, 1 Call, 190; *Ware v. Cary*, 2 Call, 263; *Currie v. Page*, 2 Leigh, 620; *Langhorne v. Hobson*, 4 Leigh, 224; *Tod v. Baylor*, *Ibid.* 498; *Hairston v. Randolphs*, 12 Leigh, 445.

³ 1 Swan & Critchf., pp. 461, 462, 464; *Newcomb v. Smith*, Wright, 208; *Johnston v. Haines*, 2 Ohio, 55; *Brown v. Farran*, 3 Ohio, 140; *Worthington v. Young*, 6 Ohio, 313; *Connell v. Connell*, *Ibid.* 353; *Hubbel v. Broadwell*, 8 Ohio, 120; *Foster v. Dennison*, 9 Ohio, 121; *Dunlap v. Mitchell*, 10 Ohio, 117; *Good v. Zercher*, 12 Ohio, 364; *Meddock v. Williams*, *Ibid.* 377; *Silliman v. Cummins*, 13 Ohio, 116; *Barton v. Morris*, 15 Ohio, 408; *Chestnut v. Shane*, 16 Ohio, 599; *Ruffner v. McLenan*, *Ibid.* 639; *Card v. Patterson*, 5 Ohio St. 319; *Williams v. Robson*, 6 Ohio St. 510; *Newell v. Anderson*, 7 Ohio St. 12; *Ward v. McIntosh*, 12 Ohio St. 231; *Conover v. Porter*, 14 Ohio St. 450; *Raverty v. Fridge*, 3 McLean, 230.

⁴ 1 Rev. St. Ky. by Stanton, p. 281, § 20; *Steele v. Lewis*, 1 Mon. 48; *Hughes v. McKinsey*, 5 Mon. 38; *Tevis v. Richardson*, 7 Mon. 655; *Philips v. Green*, 3 A. K. Marsh. 9; *Jones v. Todd*, 2 J. J. Marsh. 359; *Woods v. Caldwell*, 5 J. J. Marsh. 239; *Tomlin v. McChord*, *Ibid.* 135; *Barnett v. Shackleford*, 6 J. J. Marsh. 532; *Kay v. Jones*, 7 J. J. Marsh. 38; *Nantz v. Bailey*, 3 Dana, 111; *Miller v. Shackleford*, *Ibid.* 289; *Brown v. Starke*, *Ibid.* 316; *Worthington v. Middleton*, 6 Dana, 300; *Thompson v. Peebles*, *Ibid.* 387; *Applegate v. Gracy*, 9 Dana, 215; *Oldham v. Sale*, 1 B. Mon. 76; *Gregory v. Ford*, 5 B. Mon. 481; *McCann v. Edwards*, 6 B. Mon. 208; *Gill v. Fauntleroy*, 8 B. Mon. 177; *Blackburn v. Pennington*, *Ibid.* 217; *Ford v. Gregory*, 10 B. Mon. 175; *Elliott v. Peirsoll*, 1 McLean, 11; s. c. 1 Peters, U. S. 328.

⁵ Del. Rev. Code, 1852, p. 267, § 4; except as to deeds executed prior to May 1, 1811. *Ibid.* § 5.

⁶ Thompson's Dig. 178.

⁷ *Gilchrist v. Buie*, 1 Dev. & B. Eq. 346; *Sutton v. Sutton*, 1 Dev. & B. L. 582; *Rich v. Beeding*, 2 Ired. L. 240; *Pierce v. Wanett*, 10 Ired. L. 446; *Hathaway v. Davenport*, 2 Jones, L. 152; *Matter of Dozier's Heirs*, 1 Dev. Eq. 118; *Green v. Branton*, *Ibid.* 501; *Askew v. Daniel*, 5 Ired. Eq. 321; *Jones v. Lewis*, 5 Ired. L. 70; *Burgess v. Wilson*, 2 Dev. L. 306; *Robinson v. Barfield*, 2 Murph. 390; *Lucas v. Cobb*, 1 Dev. & B. L. 228; *Skinner v. Fletcher*, 1 Ired. L. 313; *Etheridge v. Ashbee*, 9 Ired. L. 353; *Barfield v. Combs*, 4 Dev. L. 514; *Fenner v. Jasper*, 1 Dev. & B. L. 34.

⁸ 1 Brev. Dig. p. 269, §§ 5, 6; 2 *Ibid.* p. 349, §§ 22, 23; *Hillegos v. Hartley*, 1 Hill, 106; *Scanlan v. Turner*, 1 Bail. L. 421; *Gough v. Walker*, 1 N. & M. 469; *Harrell v. Elliott*, Taylor, 139; s. c. 2 Hayw. 68; *Brown v. Spann*, Mills, Con. Court, 240. The renunciation of the wife must be recorded, or as to her the deed will be void. *Gough v. Walker*, 1 N. & M. 469; *Hillegos v. Hartley*, 1 Hill, 106.

Tennessee,¹ Michigan,² Arkansas,³ Missouri,⁴ Illinois,⁵ Oregon,⁶ Alabama,⁷ Mississippi,⁸ Minnesota,⁹ and was formerly necessary in Iowa.¹⁰

The officer taking the acknowledgment must be disinterested.

3. A magistrate can not take the wife's renunciation of dower upon a conveyance in which he is interested.¹¹ Thus, where a magistrate was bound to make title by a conveyance from a third person, he was held incompetent to receive the acknowledgment of the grantor's wife.¹² So where he was himself the purchaser, a renunciation before him was held void, although the conveyance was taken to a stranger in trust for the children of the purchaser, and the

¹ *Lasseter v. Turner*, 1 Yerg. 413; *Perry v. Calhoun*, 8 Humph. 551; *Montgomery v. Hobson*, Meigs, 437. But where there has been a sale by virtue of a decree of the court in proceedings under the Act of 1827, no privy examination is required. *Winchester v. Winchester*, 1 Head, 460.

² *Sibley v. Johnson*, 1 Mann. 380; 2 Comp. Laws Mich. p. 839, § 12. But the rule is otherwise as to non-residents. *Ibid* p. 840, § 13.

³ Dig. Stat. Ark. 1858, p. 267, § 21; *Witter v. Biscoe*, 8 Eng. 422; *Elliott v. Pierce*, 20 Ark. 508.

⁴ *Thomas v. Meir*, 18 Misso. 573; *Chauvin v. Wagner*, *Ibid*. 531; *Rogers v. Woody*, 23 Misso. 548; *McDowell v. Little*, 33 Misso. 523. See *Lecompte v. Wash*, 9 Misso. 551.

⁵ *Mariner v. Saunders*, 5 Gilm. 113; *Hughes v. Cummings*, 11 Ill. 123; *Mason v. Brock*, 12 Ill. 213; *Garrett v. Moss*, 22 Ill. 363; *Gove v. Cather*, 23 Ill. 634; *Chester v. Rumsey*, 26 Ill. 97; *Ex parte McElwain*, 29 Ill. 442.

⁶ *Moore v. Thomas*, 1 Oregon, 201; Stat. Oregon, 1855, p. 407, § 13; p. 520, § 14. A privy examination is not necessary where the wife is a non-resident. *Ibid*. p. 520, § 15.

⁷ *Owen v. Paul*, 16 Ala. 130; *Eslava v. Lepretre*, 21 Ala. 504; *Martin v. Martin*, 22 Ala. 86; *Carter v. Carley*, 23 Ala. 612; *Dundas v. Hitchcock*, 12 How. U. S. 256; *Clay's Dig.* p. 155, § 27. See p. 174, §§ 10, 11.

⁸ *How. & Hutch.* 347; *Agricul. Bk. v. Rice*, 4 How. U. S. 225; *Warren v. Brown*, 25 Missis. 66; *Love v. Taylor*, 26 Missis. 567; *Toulmin v. Heidelberg*, 32 Missis. 268.

⁹ Stat. Minn. 1858, p. 408, § 13; p. 398, § 12. A non-resident married woman may acknowledge a deed in the same manner as if she were sole. *Ibid*. p. 398, § 13.

¹⁰ *O'Ferrall v. Simplot*, 4 G. Greene, 162; *Westfall v. Lee*, 7 Clarke, 12; *Grapengeth v. Ferjervary*, 9 With. 163; *O'Ferrall v. Simplot*, 4 Iowa, 381. See *Laws Iowa*, Rev. 1860, §§ 2215, 2255; ante, ch. xii., § 47; post, § 24.

¹¹ *Withers v. Baird*, 7 Watts, 227; *Beaman v. Whitney*, 7 Shepl. 413; *Groesbeck v. Seeley*, 13 Mich. 330; s. c. *Amer. Law Reg.* July, 1865, p. 572; *Scanlan v. Turner*, 1 Bailey, L. 421.

¹² *Withers v. Baird*, 7 Watts, 227.

latter had no longer any title to the land, either at law or in equity.¹ And where an acknowledgment was taken and certified by a magistrate who was disqualified by interest, suppletory evidence that it was made by the wife freely and voluntarily, will not avail.² The reason for this rule was well stated by Gibson, J., in *Withers v. Baird*:³ "The office of a magistrate, in respect to private examination, is a judicial and delicate one. Entrusted with the business of inspecting the wife's knowledge and will, he should be superior to all exception on the score of impartiality. When he is bound to procure her concurrence, his inducement to abuse his trust is as strong as if the conveyance were made to himself; and it would not be pretended that his judicial functions could be exercised in his own case. His responsibility for the conveyance, whether through himself, or directly to the defendant, made him equally a party in interest; and no consent, short of an agreement by the vendee to take a defective title, which is not pretended, could supply the place of a separate examination. To say that the wife might precedently waive her protection from it, would be absurd; she can waive nothing or assent to nothing, except in the way pointed out by the law."⁴

4. It has been held in Iowa, that an individual owning an interest in a tract of land, is not so far interested in the entire land, as to prevent him, in his official character, from taking the acknowledgment of a deed conveying to a third party another and distinct interest in the same land.⁵ So the fact that the grantee in a deed and the party before whom it was acknowledged, had an agreement that each should purchase distinct shares in the same land, with a view to a joint speculation, might be a circumstance tending to show fraud, but in itself would not be sufficient to vitiate the deed.⁶

5. The fact that the officer taking the acknowledgment is related to the parties, does not render him incompetent to act, nor invalidate his certificate.⁷

¹ *Scanlan v. Turner*, 1 Bailey, L. 421.

² *Ibid.*

³ *Withers v. Baird*, *supra*.

⁴ See, also, the observations of the court in *Scanlan v. Turner*, *supra*.

⁵ *Dussaume v. Burnett*, 5 Clarke, 95.

⁶ *Ibid.*

⁷ *Lynch v. Livingston*, 2 Selden, 422.

Proof of the genuineness of the certificate not required.

6. If the certificate of the officer taking the acknowledgment appear on its face to be in conformity to the statute, it is commonly received as evidence of its own genuineness. Proof of the official character of the officer, or of his signature, or that the acknowledgment was taken within the jurisdiction where he was authorized to act, is not required. But the evidence of these matters furnished by the certificate is *prima facie* only, and may be rebutted.¹

Requisites of a valid certificate of the privy examination and acknowledgment.

7. Many cases have been decided in the American courts involving questions as to the requisites of a valid certificate by the officer,² of the privy examination and acknowledgment of the wife.

¹ *Thurman v. Cameron*, 24 Wend. 87; *Tracy v. Jenks*, 15 Pick. 465; *Merrick v. Wallace*, 19 Ill. 486; *Thompson v. Morgan*, 6 Minn. 295; *Willink v. Miles, Peters*, C. C. R. 429. See *Rhoades v. Selin*, 4 Wash. C. C. R. 714; 2 Washb. R. P., 2d. ed., p. 629, pl. 62.

² In Pennsylvania, a justice of the peace can not take the acknowledgment of a deed out of his proper county. *Share v. Anderson*, 7 S. & R. 43; 1 Ash. 131. In Ohio, the rule is otherwise. *Moore v. Vance*, 1 Onio, 1; *Kinsman v. Loomis*, 11 Ohio, 475, 479; *Crumbaugh v. Kugler*, 2 Ohio St. 373. So in Missouri, under the Territorial Act of Feb. 1, 1817, (1 Ter. Laws, p. 543). *Duly v. Brooks*, 30 Misso. 515. In Kentucky, a relinquishment of dower may be taken by the clerk of the county court, at any place within the county; by a magistrate at any place where he is authorized to act officially. *Woods v. Caldwell*, 5 J. J. Marsh. 239. See *Kay v. Jones*, 7 J. J. Marsh. 38. But prior to the Act of 1810, amending the statutes regulating conveyances, a clerk of the county court had no power to take the acknowledgment or proof of the execution of a deed for land not lying in the county. *Hedger v. Ward*, 15 B. Mon. 106. Where a deed was acknowledged by husband and wife before two justices of the peace, in a county where the land did not lie, but in the county in which they resided, it was held that it must appear to have been subscribed before the justices, and be recorded in the latter county. *Taylor v. Bush*, 5 Mon. 84. Under the statutes in force in 1828, two justices were authorized to take the acknowledgment of deeds and privy examination of married women without a commission only where the latter resided in a different county from that in which the land was situated; and in such case they were required to certify that the deed was subscribed as well as acknowledged in their presence. *Smith v. White*, 1 B. Mon. 16, 19. In Virginia, under the statute of 1785, ch. 62, the aldermen of the city of Richmond, not being justices of Henrico, had no authority to take privy examinations and acknowledgments of *femes covert* residing in that city. *Currie v. Page*, 2 Leigh, 620. It was held in an early case in Maryland, that an acknowledg-

But there is such a want of harmony in these decisions, and they have been made to depend so much upon local law and the circumstances of each particular case, that it is difficult to deduce from them any general rule. For this reason it has been deemed expedient to present the material points determined in the different cases as they have arisen in the several States.

8. *Maryland*. In an early case¹ in this State, a question was made as to the necessity of setting forth in the certificate the fact that the wife was examined privately and out of the hearing of her husband, and upon such examination acknowledged that she executed the deed willingly and freely, as prescribed by the Act of 1699.² In the provincial court a certificate which omitted these matters was held insufficient;³ in the court of appeals this judgment was reversed. An appeal was granted to the Lord Proprietary, but with what result does not appear. In a case⁴ occurring a number of years later, under the Act of 1715,⁵ a certificate was held

ment before a justice of the peace in a county in which the grantor did not reside, and in which the lands were not situated, was inoperative; but that it might be shown by parol that the grantor, though stated in the deed to reside in another county, was in fact a resident of the county in which the deed was acknowledged. *Gittings v. Hall*, 1 Har. & J. 14. In Maine, when no time nor place appears in a magistrate's certificate of acknowledgment, the date of the deed, and the county in which the magistrate has jurisdiction, are presumed to be the time and place of the acknowledgment. *Rackleff v. Norton*, 1 App. 274. In the absence of all proof to the contrary, the same presumption is made in Georgia. *Truluck v. Peeples*, 1 Kelly, 3.

¹ *Robins v. Bush*, 1 Har. & M'H. 50, (1723).

² The Act of 1699, ch. 42, declares that persons taking the acknowledgment of a *feme covert*, "shall examine her privately out of the hearing of her husband, whether she do make her acknowledgment of the same willingly and freely, and without being induced thereunto by fear or threats of ill usage by her husband, or fear of his displeasure; and the person or persons so examining her shall in a note or certificate of the said caption of the said acknowledgment certify her examination and acknowledgment."

³ The acknowledgment was in this form: "Memorandum: That upon the 23d day of February, Anno Domini, 1702, before us, the subscribers, two of her Majesty's justices of the peace for Talbot county, came the within written Robert Grundy and Judith, his wife, which said Judith being by us first examined as the law requires, they both acknowledged the within written deed and the premises therein contained unto the within Robert Ungle, his heirs and assigns forever, as that which he hath of the gift of the said Robert and Judith, his wife," &c.

⁴ *Webster v. Hall*, 2 Har. & M'H. 19, (1782).

⁵ The Act of 1715, ch. 47, §§ 7, 11, was a substantial re-enactment of the Act of 1699, before quoted.

defective in failing to state that the wife was examined "out of the hearing of her husband," although it set forth that she was "privately examined."¹ In the case of *Flanagan v. Young*,² decided at the same term, a deed was declared void, because the acknowledgment failed to show a separate examination of the wife.³ And in *Lewis v. Waters*,⁴ a strict adherence to the formalities prescribed by the statute was required. "No deed of lands from a *feme covert*," said Chase, J., "can be valid and operative to pass her interest therein, unless her acknowledgment is made according to the Act of 1715, c. 47. This act prescribes a precise and particular form which must be substantially complied with. The justices in making the certificate act ministerially and not judicially. Whether the form prescribed by the Act of Assembly has been pursued, must depend on an inspection of the certificate, and comparing it with the Act. . . . The writing in question is not acknowledged by the *feme* to be her deed."⁵ No inference or implica-

¹ "Maryland, ss. Be it remembered that on the 11th of December, 1769, personally appeared before us, two of his lordship's justices of the peace for Baltimore county, John Lee Webster and Susannah Webster, his wife, and acknowledged the within instrument of writing to be their act and deed, and the land and premises therein described to be the estate of the within named Joseph Waters, his heirs and assigns forever agreeably to the intent and for the purposes within mentioned; and at the same time the said Susannah Webster being by us privately examined, did declare that she made the same acknowledgment free and willingly of her own accord and consent, without being induced thereto by the fears, threats, or ill usage of her husband, his menaces or abuse."

² *Flanagan v. Young*, 2 Har. & M'H. 38.

³ "Memorandum, that on the 29th day of June, 1741, came the within named William Jones and Ann Jones, parties to the within deed, and acknowledged the land and premises therein mentioned to be the right title and estate of the within named William Sligh, his heirs and assigns forever, according to the true intent and meaning of the same deed, and the Act of Assembly in that case made and provided, acknowledged before the subscribers, two of his lordship's justices of Baltimore county," &c.

⁴ *Lewis v. Waters*, 3 Har. & M'H. 430, (1796). To the same effect, *Peddicoart v. Rigges*, 1 Har. & J. 293.

⁵ "Maryland, Dorchester county, December 16, 1777. Be it remembered that on the day and year above written, personally appeared before us the subscribers, two of the justices of the peace of the county aforesaid, the above named Jeremiah Connerby and Mary Ann, his wife, and acknowledged the lands and tenements in the above deed contained to be the right title, interest, and estate of the above named George Waters, his heirs, &c., agreeably to the true intent and meaning of the above deed; the same Mary Ann having been first privately examined by us secretly and apart and separate from her husband, whether she did the same freely and willingly of her own accord, and without being induced thereto by the threats of her hus-

tion can arise from the words 'that she acknowledges the lands to be the right and estate of the party, his heirs and assigns,' to make it her acknowledgment of the deed; nor can it be made a good acknowledgment by the concluding words 'according to Act of Assembly,' for that is the judgment or deduction of the justices, and is not warranted by the preceding part of the certificate." It was afterwards held that the omission of the words "ill usage" in the certificate invalidated the deed, notwithstanding it was stated that the wife made the acknowledgment "of her own free will, and not through any threats of her said husband, or fear of his displeasure."¹ In the next year the doctrine was laid down that acknowledgments by married women "were defective unless the exact form mentioned in the Act of Assembly on the subject was complied with."² Chase, J., remarked: "This question has been frequently decided by this court. The certificate of the acknowledgment should be in the manner the law directs; and unless so done the acknowledgment is defective, and the deed can not operate so as to bar the *feme covert*. In this case the acknowledgment is defective,³ and the deed can not operate to pass the estate of the *feme covert* in the land except during the life of the husband." In *Heath v. Eden*,⁴ the acknowledgment was pronounced defective "in not substantially pursuing the mode prescribed by the Act of Assembly, whereby *femes covert* may convey their interest in lands."⁵ The

band or fear of his displeasure, or ill usage from him, and having assured us she did the same voluntarily, and without being induced thereto by any of the causes aforesaid, according to an Act of Assembly in such case made and provided."

¹ *Hawkins v. Burrell*, 1 Har. & J. 513, (1804).

² *Corporation, &c. v. Hammond*, 1 Har. & J. 580, (1805).

³ "September 20, 1799. Then came before us Richard Jones, Junior, and Thomas Larkin, two of her Majesty's justices for the county of Anne-Arundel, Thomas Gossamay within mentioned, and acknowledged this deed according to Act of Assembly; also Susannah, his wife, daughter and legatee of the within mentioned Hanslop, who, being examined according to law, declared that she consummates this deed without the compulsion or coercion of the said Thomas, her husband."

⁴ *Heath v. Eden*, 1 Har. & J. 751.

⁵ "St. Mary's county, sc., August 23d, 1776. Then came Daniel Charles Heath and Mary, his wife, parties to the within deed, and acknowledged the same to be their act and deed according to the true intent and meaning of the same. And at the same time came Mary Heath, who being by us privately examined out of the hearing of her husband, acknowledged her right of dower to the within land and premises, and declared she did the same freely and voluntarily without threats or fear of her said husband's displeasure."

same ruling, substantially, was made in *Partridge v. Partridge*.¹ So where the word "fear" was omitted in the certificate, and no word of similar import substituted in its place, this was held to be a fatal defect.² But in the same case it was said that a literal adherence to the form prescribed by the statute is not required; the omission of words deemed essential may be supplied by terms of like signification.

9. Under the present statute of Maryland, a married woman may execute and acknowledge any deed or mortgage in the same manner as other grantors without any private examination or other ceremony.³

10. *Pennsylvania*. In the case of *Kirk v. Dean*,⁴ in which the Act of February 24, 1770,⁵ came under review, Tilghman, Ch. J., said: "This case depends upon a single question. A married woman joined her husband in the execution of a deed, dated the 27th of December, 1777, for the conveyance of land of which he was seized in his own right in fee simple. The deed was not acknowledged by the wife. Is she barred of her right of dower? It has not been contended that a married woman can by her deed convey her right to land by any principle of the common law; but it is said that she may do so by the custom of Pennsylvania. That she might have conveyed her right of dower by deed without acknowledgment before the Act of 24th February, 1770, I agree.⁶ But since the passing of that Act, the law has been altered. Although the charter of Pennsylvania extended the common law of England to this country, yet a practice very soon prevailed, and was long continued, for married women to convey, not only their right of

¹ *Partridge v. Partridge*, 2 Har. & J. 62. In this case the certificate as to the wife was as follows: "The same Elenor, wife of the said Joseph, being first privately examined by me separate and apart from her husband, whether she did the same freely, voluntarily, and of her own accord, without being induced thereto by the ill usage or threats of her said husband, or for fear of his displeasure, and having assured us she acknowledged the said deed freely and voluntarily according to the Act of Assembly in such case lately made and provided," &c. This acknowledgment which was taken in 1778, was adjudged insufficient. See, also, *Jacob v. Kraner*, 1 Har. & J. 291; *Rhea v. Rhenner*, 1 Peters, U. S. 105.

² *Hollingsworth v. McDonald*, 2 Har. & J. 230.

³ 1 Md. Code, p. 327, § 11.

⁴ *Kirk v. Dean*, 2 Binn. 341, (1810). Followed in *Thompson v. Morrow*, 5 S. & R. 289.

⁵ Purdon's Dig. by Brightly, 311, § 12; post, note.

⁶ Ante, ch. xii., § 12.

dower, but their own estates of inheritance, by deed, sometimes acknowledged before a judge or justice of the peace and sometimes not acknowledged. The case of *Davey v. Turner*,¹ was decided in the year 1764. There the wife acknowledged the deed before a justice, and expressed her consent on a private examination at the time of the acknowledgment. The special verdict finds a custom in support of the conveyance for fifty years and upwards. The decision was in favor of the conveyance, and the judgment of the supreme court was affirmed on an appeal to the king in council. Next came the case of *Lloyd's Lessee v. Taylor*,² in the year 1768. The deed of a *feme covert* executed in 1727, was held good, even without acknowledgment, evidence being given that 'it had been the constant usage of the province formerly for married women to convey their estates in this manner.' These decisions were very proper on the principle that '*communis error facit jus*.' But although it was reasonable to confirm the estates of innocent purchasers acquired under mistaken principles pardonable in the infancy of the province, yet it was high time to put a stop to a practice under which the rights of married women were left too much unprotected. Accordingly, we find that the attention of the legislature was attracted by the decision of the two cases I have mentioned, and on the 24th of February, 1770, they passed an Act on this subject."³

11. In *Watson v. Bailey*,⁴ a certificate was held defective in not showing a compliance with the statute.⁵ In *McIntire v.*

¹ *Davey v. Turner*, 1 Dall. 11.

² *Lloyd's Lessee v. Taylor*, 1 Dall. 17.

³ The Act of Feb. 24, 1770, directs that the husband and wife, having executed the deed, shall "appear before one of the judges of the supreme court, or before any justice of the county court of common pleas of and for the county where such lands, &c., lie, and to acknowledge the said deed or conveyance; which judge or justice shall, and he is hereby authorized and required to take such acknowledgment; in doing whereof, he shall examine the wife separate and apart from her husband, and shall read or otherwise make known the full contents of such deed or conveyance to the said wife; and if, upon such separate examination, she shall declare that she did voluntarily, and of her own free will and accord, seal, and as her act and deed deliver the said deed or conveyance without any coercion or compulsion of her said husband," then such deed is declared to be valid in law in like manner as if the said wife had been sole.

⁴ *Watson v. Bailey*, 1 Binn. 470.

⁵ "Lancaster county, ss.: Personally appeared before me, the subscriber, one of the justices of the court of common pleas for the county aforesaid, the within named James Mercer and Margaret his wife, and acknowledged the above written inden-

Ward,¹ determined shortly afterwards, it was adjudged not to be essential for the officer taking the acknowledgment to use the words of the Act in his certificate; but that it was sufficient if the directions of the statute were substantially followed; and if it appeared from the whole certificate that the contents of the deed were made known to the wife, the deed would be valid.² A doubt was also expressed whether it was necessary for the certificate to show that the contents of the deed were made known to the wife. This ruling was followed in *Shaller v. Brand*,³ where it was decided that a certificate of acknowledgment by husband and wife, that an indenture was their act and deed, which they desired to be recorded as such, "she, the said (wife) being of full age, separate and apart from her said husband examined, and the full contents made known to her, voluntarily consenting thereto," was good. "We have always declared," said the court, "that it was sufficient if the law was *substantially* complied with; and on any other principle of construction, the peace of the country would be seriously affected, as the certificates of the acknowledgments of deeds have generally been by persons who were either ignorant of, or disregarded the words of the Act of Assembly." So in *Talbot v. Simpson*,⁴ Washington, J., held that a substantial compliance with the directions of the statute was sufficient.⁵ But in *Evans v. The Common-*

ture to be their act and deed, and desired that the same might be recorded, she, the said Margaret being of full age, and by me examined apart. In testimony whereof I have hereunto set my hand and seal this 30th day of May, Anno Domini, 1785."

¹ *McIntire v. Ward*, 5 Binn. 296.

² In this case the following certificate was deemed sufficient: "On the 17th day of February, 1779, before us, the subscribers, two of the justices of the peace for said county, came William Neill and Isabella his wife, and acknowledged the within indenture of bargain and sale to be their act and deed according to the true intent and meaning thereof; and the lands and premises therein mentioned to be bargained and sold with all and every the appurtenances to be the right, title, interest, estate and property of the within named Samuel Todd, his heirs and assigns forever. And the said Isabella being by us privately examined apart from her said husband, and out of his hearing, acknowledged that she joined in the execution of the within deed of bargain and sale of her own free and voluntary will and accord, without being thereto compelled, or induced by any fear, threats or ill usage of her said husband, or through fear of his displeasure."

³ *Shaller v. Brand*, 6 Binn. 435.

⁴ *Talbot v. Simpson*, 1 Peters, C. C. R. 188.

⁵ A certificate in the following form was held valid: "The said Michael Simpson and Elizabeth his wife, came before the subscriber, William Mitchell, a justice of the court of common pleas for the county of York, and acknowledged the within

wealth,¹ a certificate which omitted to show that the wife had voluntarily consented to the execution of the deed was pronounced invalid.² Gibson, J., referred to the previous cases in the following terms: "The single question for our decision is, whether the deed as acknowledged, be sufficient to pass the estate of Anne Coe in the land conveyed, and I am decidedly of opinion it is not. *Watson v. Bailey* is the leading case on the subject, and from the principles established by it I am unwilling to depart. It was there decided, that the substantial requisites by which the interests of married women were intended to be protected should appear on the face of the certificate of acknowledgment to have been pursued. What are these requisites? The legislature intended that a married woman, in conveying her estate, should be a free agent, and that she should be secure from deception as well as improper influence on the part of her husband. I therefore take those requisites to be, that she be separately examined, that she have a knowledge of the nature and consequences of the act she is about to perform, and that her will in the performance of it be free. I know it is supposed by many of the profession, that in *McIntire v. Ward*, this court receded from its decision in *Watson v. Bailey*. It did not recede. There the objection was, that it did not appear the contents of the deed had been made known to Mrs. Neil by the magistrate who took the acknowledgment. The chief justice, in delivering his opinion, stated he did not consider it as having been decided in *Watson v. Bailey*, that it was necessary it should appear the contents had been made known to the wife, nor did he then intend to express an opinion on that point; but that if it were necessary, it appeared, substantially, from the special nature of the certificate, that Mrs. Neil was fully apprised of the contents of the deed. Justice Yeates gave no opinion; and Justice Brackenridge was decidedly of opinion that under the authority of *Watson v. Bailey*, communication of the contents ought substantially to appear, as also

indenture to be their act and deed, and desired that the same may be recorded as such; the said Elizabeth being by me separately and apart examined from her husband, she being of full age, knowing the contents and freely consenting thereto."

¹ *Evans v. The Commonwealth*, 4 S. & R. 272.

² "This 29th day of September, Anno 1813, before me, John Geyer, &c., came Thomas Gaest, Robert Coe and Anne his wife, and acknowledged the above instrument of writing to be their act and deed, and desired that it may be recorded as such; the said Anne being of full age, and separately and apart examined, and the contents thereof made known to her. Witness," &c.

that the execution of the deed was voluntary and without coercion; and as to that I heartily concur with him. But it never could be suspected from anything that has fallen from this court, that we held it unnecessary to set forth in substance that the wife executed the deed voluntarily and without the compulsion of her husband. In *Shaller v. Brand*, it was held that the words 'she voluntarily consenting thereto,' sufficiently indicated her assent to the *execution of the deed*, and not, as was contended, to her being separately examined; but the court again decided, that the very letter of the Act need not be pursued, but that it must appear to have been substantially complied with. But if the form of acknowledgment in the present instance should be held good, it would be better to overrule the case of *Watson v. Bailey* at once. To presume that everything was rightly and solemnly transacted before the magistrate, would be to dispense with every guard against the coercion and improper influence of the husband, which the law has interposed for the protection of the wife. Why not as well dispense with the separate examination altogether? We know how rapidly and with what little consideration of their importance these matters are usually transacted before magistrates. A certificate, well drawn by the scrivener, would suggest to the magistrate, who should read it before signing, some matters of duty on the occasion, that otherwise might escape his attention. Even this is a matter of consequence that pleads for retaining a form of certificate setting forth specially a substantial compliance with the requisites of the law. As it does not appear the wife declared that she executed the deed voluntarily, I am of opinion that the judgment be affirmed."

12. The doctrine above laid down was applied to the case of *Watson v. Mercer*.¹ "In the country whence we derive our laws," the court observed, "the wife's land can be aliened only with her assent, deliberately expressed on a fair, full, and careful separate examination in a court of record; in this, the examination is considered a

¹ *Watson v. Mercer*, 6 S. & R. 49. A certificate in the following form was held fatally defective: "Lancaster county, ss.: Personally appeared before me, the subscriber, one of the justices of the court of common pleas for the county aforesaid, the within named James Mercer and Margaret, his wife, and acknowledged the above written indenture to be their act and deed, and desired that the same might be recorded. She, the said Margaret being of full age, and by me examined apart. In witness whereof," &c.

matter of such little importance, that it is entrusted to a justice of the peace, by whom it is sometimes entirely dispensed with in fact, but often slubbered over even in presence of the husband himself. These are considerations which induce the mind to pause, before it consents to adopt the rule, that the act of the magistrate is to be considered as having been rightly done till the contrary appear; and thereby to withdraw the only protection, inefficient as it is, which the law interposes in behalf of married women." In *Fowler v. McClurg*,¹ a certificate which merely stated that the wife was examined separate and apart from her husband, and acknowledged the instrument to be her act and deed,² was held insufficient. So where the certificate set forth that the wife "voluntarily consented" to the conveyance, but did not show a separate examination, it was held invalid.³ In another case it was required that it should be expressed in the certificate that the contents of the deed were made known to the wife.⁴ The same ruling was made in *Barnet v. Barnet*.⁵ In *Jamison v. Jamison*,⁶ the certificate of acknowledgment of a married woman stated that "she being of full age, separate and apart from her husband by me examined, declared that she did voluntarily, of her own free will and accord, seal and acknowledge the within indenture without coercion of her said husband, the contents being by me first made known to her;" and this was treated as a substantial compliance with the law.⁷

13. *New Jersey*. In this State, a certificate of acknowledgment is good if it show a substantial, though not a literal compliance with the statute. Thus, where the certificate omitted to state that the grantors executed the deed voluntarily, or that the acknowledgment of the wife was on a private examination, and without any

¹ *Fowler v. McClurg*, 6 S. & R. 143.

² "Allegheney county, ss.: On the 17th February, 1794, Alexander Fowler and his wife, Sarah Fowler, personally appeared before me, one of the justices of the peace in and for the said county, (she being of full age, and by me separate and apart from her husband examined), and acknowledged the above instrument of writing as their act and deed, and desired the same might be recorded according to law."

³ *Jourdan v. Jourdan*, 9 S. & R. 268.

⁴ *Steele v. Thompson*, 14 S. & R. 84.

⁵ *Barnet v. Barnet*, 15 S. & R. 72

⁶ *Jamison v. Jamison*, 3 Whart. 457.

⁷ See, also, *Stoops v. Blackford*, 3 Casey, 213; *Louden v. Blythe*, Ibid. 22. An acknowledgment by a *feme covert* before a judge of the circuit court of Indiana, accompanied by a certificate of the clerk of that court under his private seal, (there being no seal of the court), of the official character of the judge, is sufficient to admit the deed in evidence. *Creigh v. Beelin*, 1 Watts & Serg. 83.

fear on her part, but contained words equivalent to those omitted, this was held sufficient.¹ So where a deed was acknowledged before a proper officer, who certified that the grantors acknowledged the same "to be their act and deed for the purposes therein mentioned," instead of using the language of the statute, "that they signed, sealed, and delivered the same," &c., this was held a substantial compliance with the law.² So where the certificate failed to set forth that the wife "voluntarily" executed the conveyance, this omission was held to be substantially supplied by the expression that "she freely executed the deed without any fear, threats, or compulsion of her husband."³ And it was decided in the same case, that where the certificate does not state that the wife was of the age of twenty-one years, the presumption is that she was of full age until the contrary is shown. But a certificate which wholly fails to show a private examination of the wife apart from her husband, is inoperative to divest her estate.⁴

14. *Rhode Island*. In the case of *Churchill v. Monroe*,⁵ a certificate of the acknowledgment of husband and wife in the form given in the note,⁶ was adjudged insufficient as to the wife. "The

¹ *Den v. Geiger*, 4 Halst. 225. The certificate was as follows: "Be it known that on this 29th day of April, in the year of our Lord one thousand eight hundred and eight, personally appeared before me, Caleb Halsted, Jr., one of the judges of the inferior court of common pleas holden at Elizabethtown, in and for the borough aforesaid, John Smith and Elizabeth, his wife, the grantors in the foregoing conveyance, and acknowledged that they signed, sealed and delivered the same as their act and deed, for the uses and purposes therein expressed. And the said Elizabeth, wife of the said John Smith, being by me examined separate and apart from her said husband, did acknowledge that she signed, sealed, and delivered the same, freely and voluntarily, and without any threats or compulsion from her said husband." The statute under which this acknowledgment was taken, provided, "That no estate of a *feme covert* in any lands, tenements, or hereditaments, lying and being in this State, shall hereafter pass by her deed or conveyance, without a previous acknowledgment made by her on a private examination apart from her husband, before one of the officers aforesaid, that she signed, sealed, and delivered the same as her voluntary act and deed, freely, without any fear, threats, or compulsion of her husband, and a certificate thereof written on or under the said deed or conveyance, and signed by the officer before whom it was made."

² *Sharp v. Hamilton*, 7 Halst. 109.

³ *Battin v. Bigelow*, 1 Peters, C. C. 452.

⁴ *Howell v. Ashmore*, 2 Zab. 261, 264. It is not a substantial objection to the certificate that it bears date before the deed itself. *Gest v. Flock*, 1 Green, Ch. 108.

⁵ *Churchill v. Monroe*, 1 R. I. 209.

⁶ "Then the above named Ansel Churchill, (meaning grantor) personally appear-

words of the statute," said the court, "are, that . . . in every such case, the wife acknowledging such deed or instrument shall be examined privily and apart from her husband, and shall declare to the officer taking such acknowledgment, that the deed or instrument shown and explained to her by such magistrate, is her voluntary act, and that she does not wish to retract the same. . . . It is not necessary that this certificate, to be effectual, should embrace the very words of the statute, though it would certainly be better if it did, since it would leave nothing to construction. At any rate, however brief the certificate might be, it should certify enough, and in such form as plainly to imply that the wife's acknowledgment and declarations, and the mode in which made were such as required by the statute. It certainly should not be equivocal, so that if the magistrate were called upon to answer to the law for a false certificate, it might not be taken to mean this or that, as the exigency of the case might require. . . . The object of the privy examination is not merely that she should declare to the magistrate that she had executed the deed, but that she might declare whether she had executed it freely, without constraint, and that it is, at the moment of examination, her free and voluntary act. The certificate, then, may be true; it may be that she declared it to be her deed or instrument, but by this declaration, merely, the requisitions of the statute are not answered; she does not declare it to be at that time her voluntary act. The magistrate may have intended this by his certificate. But the question is not what the magistrate intended, but what the words of the certificate by fair construction, express, or necessarily imply. We can not extend these words by construction without taking for granted the very fact which it was the design of the statute that the magistrate should certify."¹

15. *New York*. In this State, an acknowledgment taken prior to the statute of 1771, is held good, although a private examination of the wife is not shown in the certificate; after such a lapse of time, and in the absence of statute regulations prescribing the form of the certificate, it will be presumed that a private examination was had.² And since the statute, a substantial compliance

ing, acknowledged the above written instrument to be his voluntary act and deed; and the said Lillis, (his wife), being examined separately and apart from her husband, also acknowledged the same before me."

¹ See, also, *Manchester v. Hough*, 5 Mason, 67; *Richards v. Randolph*, *Ibid.* 115.

² *Jackson v. Gilchrist*, 15 John. 89. The certificate was as follows: "This day

with its requirements is all that is necessary; it need not be literally followed. Therefore, where a certificate stated that a *feme covert* acknowledged that she executed a deed without any fear, threat, or compulsion of her husband, this was held a sufficient compliance with an enactment making it necessary for her to acknowledge that she executed the deed *freely*, without any fear or compulsion of her husband.¹ In commenting upon this feature of the case, the chancellor observed: "The word *freely* is not found in the certificate of the acknowledgment of the wife in the present case. And the question is, whether the words used in the certificate do not mean the same thing substantially; so that the certificate does in fact purport, or intend to show, that the wife executed the deed freely, or voluntarily. The object of the private examination of the wife, apart from her husband, is to ascertain whether the execution of the deed was her spontaneous act; or whether she was induced to execute it by coercion, or fear of ill usage, or other injury from her husband. It is not necessary that the wife should act without a motive, in the execution of the deed, or execute it as a mere act of generosity, without any hope of present or future benefit resulting from it. Nor is the word *freely* in the statute intended to be used in any such sense; but it there means, without constraint, coercion, or fear of injury from the husband, under whose power and control she is legally supposed to be. I think, therefore, that when Master Ray certified that he examined Mrs. Harsen privately and apart from her husband, as to her execution of the deed in question, and that she acknowledged she executed it without any fear, threat, or compulsion of her husband, his certificate was a substantial compliance with the statute." So a certificate of acknowledgment of the execution of a deed by a married woman, stating that on an examination before the officer, "separate and apart from her husband," she acknowledged the execution of the same "without fear or compulsion from him," is a sufficient compliance with the statute requiring the officer to certify, upon an acknowledgment of a *feme covert*, that on "private examination apart from her husband, she executed the conveyance *freely*, and without any fear or compulsion of her husband." The omission of

came before me, one of his majesty's justices for the county of Essex, the within mentioned Joshua Hunloke and Ann, his wife, to acknowledge this indenture to be their acts and deed, this 19th day of February, 1711."

¹ Meriam v. Harsen, 2 Barb. Ch. 232; 4 Edw. Ch. 70.

the words "private" and "freely" does not affect its validity.¹ So in certifying an acknowledgment under the statute of 1813,² it was sufficient for the officer to say, "before me came A. B. to me known, and acknowledged that he executed the above deed," &c., without saying "to me known to be the person who executed the above deed."³

16. *Virginia*. Tucker, in his Commentaries, after referring to the provisions of the Virginia statute relating to the wife's acknowledgment, remarks:⁴ "Here we see that the object of the law is to ascertain, by a privy examination of the wife, apart from her husband, whether, in the execution of the deed disposing of her rights, she exercises that free will which is the essence of all contracts. This is effected by an examination in court by one of the judges thereof, or in vacation by two justices of the peace. Now, upon well received principles, it is clear that this act must be strictly pursued; for it is an innovation upon the common law; and, moreover, it prescribes the mode in which a person may convey, who was before disabled to convey. That mode must, therefore, be pursued; and as we do not pursue it if we vary from it, so it follows that it should be substantially, at least, complied with." In a case determined in 1795, in which a question was made as to the sufficiency of the acknowledgement of a married woman, it did not appear that the commissioners who took the privy examination were justices of the peace; they were not stated to be such in the commission nor in the certificate. Roane, J., said: "An objection is made to the title of the appellee, because the commission which was to enable Mrs. Pritchard to pass away her estate, was not directed to justices of the peace. The Act of 1748⁵ requires the commission to be addressed to persons being justices of the peace, but it does not prescribe the form of it. It is certainly necessary that the commissioners should in reality answer this description, because the law requires it, but it does not require that they should be so styled

¹ *Dennis v. Tarpenny*, 20 Barb. 371. ² 1 Rev. Laws, 1813, ch. 97, §§ 1, 2.

³ *Jackson v. Gumaer*, 2 Cow. 552; *Troup v. Haight*, Hopk. 239, 267; *Duval v. Covenhoven*, 4 Wend. 561. See *Jackson v. Vickory*, 1 Wend. 406; *Jackson v. Osborn*, 2 Wend. 555; *Van Cortlandt v. Tozer*, 17 Wend. 338; s. c. 20 Wend. 423; *Lynch v. Livingston*, 8 Barb. 463; *Jackson v. Phillips*, 9 Cow. 94, 111; *Dias v. Glover*, 1 Hoffm. 71; *Thurman v. Cameron*, 24 Wend. 87; *Hunt v. Johnson*, 19 N. Y. 279; *Platt v. Brown*, 30 Conn. 336.

⁴ Vol. i., tit. Deeds of *Feme Covert*, p. 267.

⁵ Act of 1748, ch. 1, § 6; 5 Hen. 410.

in the commission. The question then is, ought we to presume the fact that they were justices? I think we ought. The law requires the clerk to direct it to such persons, and he ought not to be presumed to have done wrong. The contrary might have been shown, and if the party meant to avail himself of this objection he ought to have proved the fact."¹ And it is settled, that it is sufficient if the requisitions of the statute be substantially complied with.² Thus, where a certificate under the Act of 1792³ stated that the wife made her acknowledgment freely and voluntarily, and that she was willing the conveyance should be recorded, but did not show a declaration by her that she had willingly signed and sealed it, or that it was shown and explained to her by the commissioners, it was held, that if she had in fact signed the deed, such certificate was substantially a compliance with the statute, and sufficient to bind her; but if she had not signed it, the acknowledgment so certified was invalid.⁴ Under the Act of 1814,⁵ the certificate must show that the wife was apprised of the contents of the conveyance. Where the certificate set forth that the wife appeared before the justices, and separately and apart from her husband acknowledged that she had willingly executed the deed on her part, and wished not to retract it, it was held that the certificate was defective in not showing that the deed was explained to her, or that she was in some way informed of its contents.⁶ So an omission in the certificate to state the wife's declaration that she did not wish to retract what she had done, is a fatal defect.⁷ And a certificate by a clerk that a deed was acknowledged in court by a husband and wife, and ordered to be recorded, is not sufficient to make it her deed.⁸

17. *Kentucky*. In the case of *Hughes v. McKinsey*,⁹ the court decided that a clerk's certificate was sufficient to pass a right to dower which only stated that the wife *being examined as the law directs*, voluntarily relinquished her right of dower to the land mentioned in the indenture. The following is the reasoning of the court in support of their opinion: "By the Act of 1803,¹⁰ it is de-

¹ *Harvey v. Borden*, 2 Wash. 156.

² *Langhorne v. Hobson*, 4 Leigh, 224; *Tod v. Baylor*, Ibid. 498. See *Ware v. Cary*, 2 Call, 263.

³ 1 Old Rev. Code, ch. 90, § 6.

⁴ *Tod v. Baylor*, 4 Leigh, 498.

⁵ Incorporated in the Statute of Conveyances, 1 Rev. Code, ch. 99, § 15.

⁶ *Hairston v. Randolphs*, 12 Leigh, 445. See *Harvey v. Peck*, 1 Munf. 518.

⁷ *Grove v. Zumbo*, 14 Gratt. 501.

⁸ *Healy v. Rowan*, 5 Gratt. 414.

⁹ *Hughes v. McKinsey*, 5 Mon. 38, (1827).

¹⁰ 1 Digest, 321.

clared 'it shall and may be lawful for any relinquishment of dower to be acknowledged before the county court clerk, who shall record a certificate thereof.' That made by the clerk in this instance is comprehensive enough as to her acknowledgment of the deed; and as to her voluntary relinquishment of dower upon examination 'as the law directs,' we must, as to the subject of dower give credence to this judicial act, and presume it was rightly done until the contrary is shown." But in *Nantz v. Bailey*,¹ the doctrine thus broadly laid down was questioned. "We do not consider," the court observed, "the act of the clerk to be 'judicial;' nor are we prepared to concur in the opinion, that a certificate that there had been such 'examination as the law directs,' would, of itself, be sufficient to show that there had been a proper privy examination. The clerk acting ministerially should certify facts and not his own opinions or deductions; and such facts should be certified as may enable a court to decide that the facts being admitted, the law had been fulfilled." It was held, however, in the same case, that a substantial compliance with the statute is all that is required; and that if the certificate clearly import that the wife was privately examined by a proper officer; that the effect of the deed was explained to her; and that she declared it was freely executed by her, and that she did not wish to retract, whatever the *form* of the certificate, the deed will be effectual. Upon the conveyance there in question, the clerk certified the acknowledgment of both husband and wife; and that having examined the wife "separate and apart from her said husband, she declared that she relinquished her right of inheritance to the land contained in this deed of her own free will and accord, without the threats or persuasion of her husband, and wishes not to be retracted." It was objected that here was no statement that the acknowledgment of the wife was made apart from her husband, nor that she acknowledged the signing and sealing; nor that the deed was shown and explained to her on privy examination. But it was held that although the certificate did not show a literal compliance with the statute, it did exhibit the substance of every fact required to be certified and recorded. In considering the objections urged, the court remarked: "It is not in-

¹ *Nantz v. Bailey*, 3 Dana, 111, (1835). See, also, *Gregory v. Ford*, 5 B. Mon. 471, 482-3; *Gill v. Fauntleroy*, 8 B. Mon. 177, 178; *Blackburn v. Pennington*, *Ibid.* 217. In the two cases last cited the doctrine of *Hughes v. McKinsey* is in effect overruled. See *infra*.

dispensable that the certificate should state the exact process of examination in verbal detail; such particularity has never been observed or required. That such questions were asked, such explanations made, and such answer given as those required by the statute, must be presumed from the fact of a *privy* examination by an officer appointed for that purpose by the law itself, in consequence of his presumed capacity and fidelity, and from the fact that upon that examination the appellant declared that she had freely relinquished all her right to the land. For otherwise we must presume either that the clerk knew that what he certified was false, or that he did not understand his official duty or the import of his certificate. He has not certified matters of opinion but matters of fact; and if the certified facts be true, the requisitions of the statute have been fulfilled or the clerk did not understand them, or what he was certifying. The facts being accredited as they must be, we will not presume that the clerk did not understand the statute or comprehend his own certificate. But we will presume that he understood both as he should have done." To the same effect is the case of *Gregory v. Ford*,¹ where the deed of a *feme covert* was pronounced valid although the certificate failed to show that it was explained to her on her *privy* examination.² "We are disposed," the court said, "to construe the statutes and the certificates liberally with a view of sustaining, rather than of destroying titles derived from *femes covert*." "The statutes direct the clerk what he is to do in making the *privy* examination, and require the fact of *privy* examination, but not the manner or particulars of it to be certified. As the fact of *privy* examination and the declaration of the *feme* that she freely and voluntarily sealed and delivered, &c., are certified, we think it should be implied that the deed was shown and explained. First, because the clerk should be presumed to have done his duty in making the examination; and again, because it should not be presumed that he would certify her declaration that she had freely and voluntarily sealed and delivered the deed without ascertaining that she understood what she had done." In *Gill v. Fauntleroy*,³ the ruling made in the fore-

¹ *Gregory v. Ford*, 5 B. Mon. 471, 481.

² The certificate of the clerk stated that the wife had acknowledged the deed before him, and that she being examined by him privily and apart from her husband, declared to him that she did freely and willingly seal and deliver the said indenture, and wished not to retract it.

³ *Gill v. Fauntleroy*, 8 B. Moa. 177, 180, 182-3.

going cases was followed and approved. But it was nevertheless held that to constitute a valid acknowledgment, the certificate of the clerk must state expressly, or show by clear implication that the wife was privately examined, and upon such examination declared that she freely and willingly executed the deed. A certificate which omitted these requisites was declared fatally defective;¹ and the addition of the words "as the law directs," was held to give no additional validity to the certificate.² So a certificate which failed to show that the acknowledgment of the wife was voluntary was held ineffectual to divest her right.³

18. By the present statute of Kentucky, the deed of a married woman, to be effectual, is required to be acknowledged before an officer authorized to act in the premises, and to be recorded. Previous to the acknowledgment, it is made the duty of the officer to explain to her the contents and effect of the deed, separately and apart from her husband; and thereupon, if she freely and voluntarily acknowledge the same, and is willing for it to be recorded, the officer must certify that the deed "was acknowledged before him, and when it was done; which shall be evidence that she had been examined separately and apart from her husband, and the contents explained to her, and that she had voluntarily acknowledged the instrument, and consented that it should be recorded."⁴ If the acknowledgment be not recorded within the time prescribed

¹ "Mercer county, sct. This day John Fauntleroy and Margaret, his wife, a party to the within indenture, personally appeared before me, and acknowledged the same to be their act and deed, and the said Margaret, separate and apart from her said husband, acknowledged the said indenture to be her act and deed, and relinquished her right of inheritance to the land in said indenture mentioned, and also relinquished her right of dower as the law directs."

² Upon this point the case of *Hughes v. McKinsey*, *supra*, was in effect overruled. See, also, *Blackburn v. Pennington*, *infra*.

³ *Blackburn v. Pennington*, 8 B. Mon. 217. The following is the form of the certificate in that case. "Kentucky, Lincoln county, sct. I do certify that on the 10th day of March, 1813, this indenture of bargain and sale from James Blackburn and Jane, his wife, to Edward Pleasants, was presented to me in my office, and acknowledged by the said James Blackburn and Jane, his wife, to be their act and deed, the said Jane being privily examined as the law directs. Whereupon I admitted the same to record in my office." See, also, *Elliott v. Peirsol*, 1 Peters, U. S. 328; s. c. 1 M'Lean, 11; *Tevis v. Richardson*, 7 Mon. 654; *Whitaker v. Blair*, 3 J. J. Marsh. 236; *Prewit v. Graves*, 5 J. J. Marsh. 114; *Barnett v. Shackleford*, 6 J. J. Marsh. 532; *Ford v. Gregory*, 10 B. Mon. 175.

⁴ 1 Rev. St. Ky. by Stanton, p. 281, § 22; *Allen v. Shortridge*, 1 Duvall, (Ky.) 34.

by the statute, it will not bind the wife.¹ But in such case, if it be re-acknowledged by her and then recorded, it will be good.²

19. *Ohio*. In the case of *Brown v. Farran*,³ which arose under the Act of 1818,⁴ it was held, that the omission in the certificate of the words "without any fear or coercion of her husband," was supplied by the statement that the wife, on a separate examination acknowledged the conveyance to be her "voluntary act and deed."⁵

¹ 1 Rev. St. Ky. p. 281, § 23; *Elliott v. Peirsol*, 1 Peters, U. S. R. 328; s. c., 1 McLean, 11; *Thompson v. Peebles*, 6 Dana, 387; *Barnett v. Shackelford*, 6 J. J. Marsh. 532; *Tevis v. Richardson*, 7 Mon. 654; *Applegate v. Gracy*, 9 Dana, 215; *Whitaker v. Blair*, 3 J. J. Marsh. 236; *Ford v. Gregory*, 10 B. Mon. 175. As to the effect of recording the certificate of the privy examination of the wife in a blank left in the record, and correcting an error in the name, see *Geddes v. Western Baptist Theolog. Inst., &c.*, 13 B. Mon. 530.

² 1 Rev. St. Ky. by Stanton, p. 281, § 23. Where a deed is acknowledged in open court, a certificate that it was so acknowledged, without stating by whom, is sufficient. It will be presumed to have been by the grantor. *Philips v. Ruble*, Litt. Sel. Cas. 221. A privy examination by the clerk out of court, is sufficient. *Pendergast v. Gwathmey*, 2 A. K. Marsh. 67. The courts will not presume that a commission for the privy examination of a *feme covert* had been issued and lost, (as the law required it to be recorded with the deed), where everything else appears to make the conveyance complete, and there is no allegation or proof of such loss. *Gray v. Patton*, 2 B. Mon. 12. Where justices of the peace take the acknowledgment, the certificate must be under their hands and seals. *Kemper v. Hughes*, 7 B. Mon. 255.

³ *Brown v. Farran*, 3 Ohio, 140.

⁴ 2 Chase, 1041. This Act provided, "That when a husband and wife, she being eighteen years of age or upwards, shall, within this State execute any deed, mortgage, or other instrument of writing, for the conveyance or incumbrance of the estate of the wife, or her right of dower to any lands, tenements or hereditaments whatsoever, such deed, mortgage, or other instrument of writing, shall be signed and sealed by the husband and wife, and the signing and sealing thereof be acknowledged by them in the presence of two subscribing witnesses, who shall attest the acknowledgment of such signing and sealing, and also be acknowledged before a judge of the court of common pleas, or a justice of the peace; and the judge or justice taking such acknowledgment shall examine the wife separate and apart from her said husband, and shall read, or otherwise make known to her the contents of such deed, mortgage, or other instrument of writing and if, upon such examination she shall declare that she voluntarily and of her own free will and accord, without any fear or coercion of her husband, did, and now doth acknowledge the signing and sealing thereof, the said judge or justice shall certify the same, together with the acknowledgment of the husband on the same sheet on which such deed, mortgage, or other instrument shall be printed or written, subscribing his name, and affixing his seal to said certificate."

⁵ "State of Ohio, Hamilton county, ss.: Before me, the undersigned, a justice of the peace within and for said county, personally appeared David Brown and Catharine Brown, his wife, who, having been made acquainted with the contents, and

The views of the court upon this point were expressed as follows: "The third objection is, that it does not appear from the certificate, that the wife acted without any fear or coercion of her husband. It is true that those words are not contained in the certificate, but the justice certifies that she acknowledged the deed to be her voluntary act, and if voluntary, it could not have been done under the influence of fear or coercion. The term voluntary, is defined to be, acting without compulsion, acting by choice, willing, of one's own accord. The declaration of the wife, then, on her separate examination, excludes the idea of fear, or force. If she executed the instrument willingly, of choice, and of her own accord, as her admission before the justice imports, she could not have been under the influence of fear, much less of coercion. An act done in consequence of fear, can not be done willingly, and of choice. The one unavoidably excludes the other, so that the magistrate, although he has not used all the words given in the statute, has taken one which includes the substance of all the others. . . . It will not be seriously contended, that the magistrate is bound to use the same language that he finds in the statute. The legislature have not undertaken to prescribe a form of acknowledgment that is to be literally pursued. If the certificate contains the substance of the law, although in the language of the officer, it is sufficient.¹ On any other principle it is a matter of doubt, whether the records of the State contain a solitary deed with a valid acknowledgment. It is, however, safe and prudent to adopt the language of the Act, with but little, if any variation, and yet it would be attended with destructive consequences to consider such an adherence as essential to the validity of an acknowledgment. It may become a question, then, how far the magistrate may deviate from the words of the Act. I would answer the inquiry by saying, that his certificate

being examined separate and apart, the wife from the husband, acknowledged the above indenture to be their voluntary act and deed for the uses and purposes therein mentioned. In witness," &c. In *Hubbel v. Broadwell*, 8 Ohio, 120, the following acknowledgment, taken under the same statute, was held valid: "State of Ohio, Hamilton county, ss.: Before me, the undersigned, a justice of the peace, came Gabriel Hubbel, and Martha, his wife, who being made acquainted with the contents, and being examined separate and apart, acknowledged the above," &c. Lane, J., remarked: "The acknowledgment of the deed, although slovenly, is well enough. It admits of no sensible interpretation, except that which shows the essential requisites of the law were complied with."

¹ See *Barton v. Morris*, 15 Ohio, 408, 423.

must contain the substance of everything required by the law. No substantial part of the provision can be dispensed with. It must appear expressly, or by irresistible inference from the language of the certificate, that the wife was acquainted with the nature of the deed; that she was examined apart from her husband; that she acknowledged the deed, and admitted that it was her voluntary act, in such terms as necessarily excluded the influence of fear or coercion."¹

20. In *Newcomb v. Smith*,² determined on the circuit, the certificate failed to show any separate examination of the wife, but stated that the acknowledgment was made "agreeably to the Act in such cases made and provided." This was regarded as sufficient, the words "agreeably to the Act," including, in the opinion of the court, all that the law required. But in a case decided shortly afterwards by the court in bank, it was expressly held, that to bar the dower of the wife by a deed executed under the Act of 1805,³ it is necessary that the certificate should show that the wife was made acquainted with its contents;⁴ and this doctrine was affirmed

¹ It was further held in this case that the words of the statute "*did and now doth acknowledge*," do not, in terms, require a declaration before the officer, that the wife did acknowledge the deed without fear or coercion before the witnesses; but that the statute meant only that she did sign and seal the deed before the witnesses, and doth before the officer voluntarily acknowledge it.

² *Newcomb v. Smith*, Wright's Rep. 208.

³ It is required by this Act that in taking the wife's acknowledgment, the officer "shall examine the wife separate and apart from her husband, and shall read, or otherwise make known the full contents of such deed or conveyance to the said wife; and if, upon such separate examination, she shall declare that she did voluntarily and of her own free will and accord, seal, and as her act and deed, deliver the said deed or conveyance without any coercion or compulsion of her husband, every such deed or conveyance shall be, and the same is hereby declared to be good and valid in law, to all intents and purposes, as if the said wife had been a sole, and not covert at the time of such sealing and delivery; and the judge or justice taking such acknowledgment, shall, under his hand and seal certify the same upon the back of the deed or conveyance." 1 Chase, 485.

⁴ *Connell v. Connell*, 6 Ohio, 353. The certificate held defective in this case was as follows: "Personally came John Connell and Eleanor, his wife, before me, John Barrett, one of the justices of the peace for said county, and acknowledged the within indenture to be their voluntary act and deed, for the purposes therein expressed; the said Eleanor, when being privately examined, separate and apart from her husband, acknowledged that she signed the same of her own free will, without any compulsion from her husband, and so freely relinquished her right of dower."

in several subsequent cases.¹ In one of these the certificate stated that the wife had been examined "according to law."² In remarking upon this form of certificate, the court said: "A certificate by the officer that he has acted according to law, is no evidence that the things are done which the law requires. It is evidence of the opinion of the officer, nothing more. It is the duty of the officer to certify the things he has done, and the court will then judge whether he has pursued the law. It is not a certificate of the opinion of the officer that he has pursued the law, which the statute requires, but a certificate of the acts he has pursued in obedience to the statute. The certificate itself must contain all the acts done, that it may appear upon its face that the requisitions of the statute have been complied with."³ Shortly afterwards, however, these cases were, upon elaborate argument, overruled; and it was repeatedly adjudged, that the omission in the certificate of a statement that the contents of the deed were made known to the wife, did not affect its validity.⁴ "Why," said the court in *Chesnut v. Shane*,⁵ "require a certificate under the officer's hand and seal of his own performance of duty? It would not give any strength to the legal presumption based upon his oath of office. His official oath would be violated by taking and certifying the acknowledgment while the wife was ignorant of the contents; and surely if his official oath can not be trusted, his certificate would be utterly worthless." In *Ruffner v. McLenan*,⁶ the deed was executed under the law of 1805. The certificate set forth that the grantors "being examined separately, acknowledged the above deed of conveyance to be their voluntary act and deed for the uses and purposes therein mentioned, as the law directs," and this was held sufficient. So in

¹ *Good v. Zercher*, 12 Ohio, 364; *Meddock v. Williams*, *Ibid.* 377; *Silliman v. Cummins*, 13 Ohio, 116. See *Raverty v. Fridge*, 3 McLean, 230; *Worthington v. Young*, 6 Ohio, 313.

² "Before me, James Sisson, a justice of the peace within and for said county, personally appeared Abijah Meddock and Rachael, his wife, who being examined according to law, acknowledged the above deed of conveyance to be their voluntary act and deed for the uses and purposes therein mentioned."

³ *Meddock v. Williams*, 12 Ohio, 377, 387.

⁴ *Chesnut v. Shane*, 16 Ohio, 599; *Ruffner v. McLenan*, *Ibid.* 639, 653; *Philips v. Disney*, *Ibid.* 654; *Meddock v. Tift*, *Ibid.* 660; *Vattier v. Chesseldine*, *Ibid.* 661; *Card v. Patterson*, 5 Ohio St. 319; *Williams v. Robson*, 6 Ohio St. 510.

⁵ *Chesnut v. Shane*, *supra*.

⁶ *Ruffner v. McLenan*, *supra*. The certificates in *Meddock v. Tift*, and in *Vattier v. Chesseldine*, were substantially in the same form.

Philips v. Disney,¹ arising under the same statute, a certificate was held valid which failed to show a separate examination, and merely stated that the grantors "acknowledged the within conveyance to be their voluntary act and deed, executed for the uses and purposes . . . therein contained, agreeably to the statute in such cases made and provided." The case of Card v. Patterson,² called for a construction of the Act of 1831,³ and it was there held, that the provisions of that Act did not require the officer to certify that he had made known to the wife the contents of the deed.⁴ But in Ward v. McIntosh,⁵ it was decided that under that statute, the certificate must show a declaration by the wife, on her separate examination, "that she did voluntarily sign, seal, and acknowledge the instrument, and that she is still satisfied therewith;" and a certificate which omitted this matter was declared void.⁶ "We are aware," the court said, "that the views here expressed are in conflict with the case of Card v. Patterson.⁷ In that case, which arose under the Act of 1831, a certificate by the justice of the peace, 'that the said Maria, (the wife), being by me examined separate and apart from her husband, declared that she signed the same of her own

¹ Philips v. Disney, *supra*.

² Card v. Patterson, 5 Ohio St. 319.

³ The statute of 1831, provides: "The officer before whom such acknowledgment shall be made, shall examine the wife separate and apart from her husband, and shall read or otherwise make known to her the contents of such deed, mortgage, or other instrument of writing; and if, upon such separate examination, she shall declare that she did voluntarily sign, seal, and acknowledge the same, and that she is still satisfied therewith, such officer shall certify such examination and declaration of the wife, together with the acknowledgment as aforesaid on such deed." 1 Swan & Critchf. 461.

⁴ The following certificate was held sufficient: "Before me, the subscriber, an acting justice of the peace in and for the county aforesaid, personally came John Edlebute and Maria, his [wife], signers to the foregoing deed of conveyance, and severally acknowledged the signing and sealing thereof to be their free, voluntary act and deed, for the uses and purposes therein expressed; the said Maria being by me examined separate from her husband, declared that she signed the same of her own free will and accord." This decision was affirmed in Williams v. Robson, 6 Ohio St. 510. That case, however, arose under the act of 1820. 2 Chase, 1139. See, also, Newell v. Anderson, 7 Ohio St. 12.

⁵ Ward v. McIntosh, 12 Ohio St. 231.

⁶ "The above named John McIntosh and Susannah, his wife, she being examined apart from her husband, agreeably to law, and the contents of this deed made known to her, the signers and sealers of the above instrument, personally appeared and acknowledged the same to be their free and voluntary act and deed, before me."

⁷ Card v. Patterson, *supra*.

free will and accord,' preceded by the joint acknowledgment of the deed by her and her husband, was held effective to transfer her interest in the lands conveyed. This certificate, it is true, varies from the certificate of Mrs. McIntosh, in this, that it is preceded by a joint acknowledgment of husband and wife, and renders the inference that she thereby expressed her satisfaction less forced than in the case at bar. Still, it is not to be disguised, that under our conceptions of the statute, the certificate was insufficient. The declaration of continued satisfaction, to which we attach such importance, does not appear to have been noticed by the court, or the counsel managing the cause. . . . While we entertain profound respect for the learning and ability of the court making the decision in that case, we are constrained to think it was decided upon its supposed analogy to adjudications under statutes essentially variant, and without properly estimating the change effected or intended to be effected by the Act of 1831." In quite a recent case,¹ under the same statute, a certificate in the form given in the note,² was held sufficient.³

21. *Indiana*. In *Clark v. Redman*,⁴ it was held that to effect a relinquishment of dower under the statute of 1823,⁵ the acknowledgment of the wife must appear to have been made separately and apart from the husband. It was subsequently settled that the act of 1824, did not require the certificate to show that the con-

¹ *Browder v. Browder*, 14 Ohio St. 589.

² "On this 29th day of Feby., 1836, Hector S. Browder and Catharine, his wife, the grantors named in the foregoing deed of conveyance, personally appeared before me, one of the justices of the peace in and for said county, and severally acknowledged the signing and sealing of the same as their act and deed, for the purposes therein expressed. And the said Catharine having been made known to the contents of said deed, and being by me examined separate and apart from her husband, declared that she voluntarily, and of her free will and accord, without fear or coercion of her husband, did, and now doth, acknowledge the signing and sealing thereof."

³ It has been decided in Ohio, that a certificate of acknowledgment of a deed made upon a separate strip of paper, attached to the deed by a wafer, with the officer's seal upon the same, by a commissioner of deeds in New York, appointed by the Governor of Ohio, under the Act for appointing commissioners, passed January 26, 1844, is not in compliance with the statute requiring the officer taking an acknowledgment to "certify such acknowledgment on the *same sheet* on which such deed is printed or written." *Winkler v. Higgins*, 9 Ohio St. 599. Since this decision was made, a statute has been adopted allowing defects of this character to be corrected. 1 Swan & Critchf. p. 473, § 27.

⁴ *Clark v. Redman*, 1 Blackf. 379.

⁵ Stat. 1823, p. 334.

tents of the deed had been made known to the wife.¹ "The statute does not require as we understand it," the court observed, "the certificate to show anything more on the subject than the declaration or acknowledgment of the wife, that she had voluntarily executed the deed. It will be presumed, the contrary not appearing, that the officer did his duty as to the separate examination of the wife, and the making her acquainted with the contents of the deed. It is the acknowledgment only, not the circumstances under which it was made, that is required to be certified."² And in *Owen v. Norris*,³ the acknowledgment of the wife as shown by the magistrate's certificate, agreeing in substance, though not in words with that prescribed by the statute was held sufficient. So, under the statute of 1838, it is to be presumed, the contrary not appearing, that the acknowledging magistrate properly performed his duty with regard to the separate examination of a married woman.⁴ So where a certificate of acknowledgment after certifying that the husband and wife had voluntarily executed the deed, proceeded as follows: "The said wife having been by me examined separate and apart from her said husband, and the contents of the above deed being read and explained to her *as the law directs*, acknowledged the same to be her voluntary act and deed without force or coercion from her said husband;" it was held that the certificate showed a legal acknowledgment under the revised statutes of 1843.⁵ In a subsequent case arising under the same statute, it was decided that the certificate of the acknowledgment of a married woman must show by the facts stated in it, that she had been examined in the

¹ *Stevens v. Doe*, 6 Black. 475; *Watson v. Clendenin*, Ibid. 477; *Davis v. Bartholomew*, 3 Ind. 485. In *Stevens v. Doe*, the certificate was in this form: "Before me, D. Weaver, a justice of the peace within and for the said county, personally appeared John Henry and Martha Henry, his wife, the said Martha Henry being examined separate and apart from her husband as the law directs, and acknowledged the above deed of conveyance to be their voluntary act and deed for the uses and purposes therein mentioned. In testimony," &c.

The certificate in *Davis v. Bartholomew*, after reciting the acknowledgment by the grantors, proceeded as follows: "And the said R. the wife of the said J., having been by me examined separate and apart from her said husband as required by law, touching the above deed, declared that she signed, sealed, and delivered the same of her own free will and accord, without any coercion or compulsion of her said husband, and that she thereby relinquished all her right and claim to dower in the said premises. In witness," &c.

² *Stevens v. Doe*, 6 Blackf. 475.

⁴ *Fleming v. Potter*, 14 Ind. 486.

³ *Owen v. Norris*, 5 Blackf. 479.

⁵ *Pardun v. Dobesberger*, 3 Ind. 389.

manner prescribed by the statute, or the deed as to her will not be valid.¹ In that case the certificate stated that the wife had been examined separate and apart from her husband as required by law; but did not state that she had been examined *without the hearing of her husband*; and this was regarded by the court as a fatal defect.² By the present statute it is not necessary "for a married woman to acknowledge her deed in any form other than that required by unmarried persons."³

22. *Illinois*. In this State the certificate and acknowledgment are regarded as forming an essential part of the execution of a deed.⁴ It is held, however, that a certificate is sufficient which shows the requirements of the statute to have been substantially followed;⁵ but these requirements must not be departed from in any essential particular.⁶ A certificate which fails to show that the wife was known to the officer to be the person who signed the deed is insufficient.⁷ So an acknowledgment which does not state that she was made acquainted with the contents of the deed and relinquished her dower, entirely fails to comply with the statute.⁸ And it has been held that a certificate, to pass the title of a *feme covert*, should state that she was made acquainted with the contents of the deed, or that she was examined separate and apart from her husband, and acknowledged that she executed it freely and without compulsion.⁹ But the words "does not wish to retract," do not properly constitute any part of the acknowledgment; they are inserted in the statute to afford a married woman an opportunity to avoid a deed conveying her interest, which she has voluntarily executed, if, at the time the officer takes the acknowledgment she desires to retract what she has done.¹⁰

¹ *Jordan v. Corey*, 2 Carter, 385.

² To the same effect, *Butterfield v. Beall*, 3 Ind. 203.

³ 1 Rev. St. Ind. 1852, p. 236, § 23; *Hubble v. Wright*, 23 Ind. 322.

⁴ *Mariner v. Saunders*, 5 Gilm. 113; *Hughes v. Cummings*, 11 Ill. 123; *Mason v. Brock*, 12 Ill. 273.

⁵ *Hughes v. Cummings*, 11 Ill. 123.

⁶ *Ibid.*; *Mason v. Brock*, 12 Ill. 273; *Owen v. Robbins*, 19 Ill. 545; *Gove v. Cather*, 23 Ill. 634; *Garrett v. Moss*, 22 Ill. 363.

⁷ *Gove v. Cather*, 23 Ill. 634.

⁸ *Owen v. Robbins*, 19 Ill. 545.

⁹ *Garrett v. Moss*, 22 Ill. 363.

¹⁰ *Hughes v. Cummings*, 11 Ill. 123. On the subject of acknowledgments in Illinois, reference may be had to the following additional authorities: *McConnel v. Reed*, 2 Scam. 371; *Ayres v. McConnell*, *Ibid.* 307; *McConnel v. Johnson*, *Ibid.* 522; *Livingston v. Kettelle*, 1 Gilm. 116; *Vance v. Schuyler*, *Ibid.* 161.

23. *Michigan*. It has been determined in this State, that a certificate of acknowledgment of the execution of a deed by a married woman under the Act of 1840,¹ setting forth that "separately and apart from her husband she acknowledged that she executed the same freely, and without fear or compulsion of any one," without stating that it was done on a private examination, is void.²

24. *Iowa*. It was held in the case of *O'Ferrall v. Simplot*,³ that under the Act of 1840, it is essential to the validity of the acknowledgment of a deed by a married woman, that the certificate of the officer taking it, show that the contents of the deed were made known to her, and that she freely relinquished her dower in the premises. It has also been regarded as necessary that the acknowledgment should show the deed to be the "voluntary" act of the grantor.⁴ But a substantial compliance with the law was declared to be all that was required.⁵ And now by statute, it is provided that a married woman may convey her interest in real estate in the same manner as other persons;⁶ and under this enactment, if husband and wife join in a conveyance, no private examination is necessary to render valid the execution of the deed.⁷

25. *Missouri*. In *Chauvin v. Wagner*,⁸ it was held that under the Act of 1825, a certificate of acknowledgment by a married woman, is not vitiated by the omission to state that the contents of the deed were explained to her, if it show that she had actual knowledge of the contents.⁹ And a majority of the court concurred

¹ Sess. L. 1840, p. 167, § 4. "That the rights of dower which any *feme covert* may have to any lands in the State of Michigan, shall not be passed or conveyed only by deed executed by such *feme covert*, and acknowledged by such *feme covert* on a private examination separate and apart from her husband, that she executed the deed without fear or compulsion from any one; which acknowledgment shall be certified upon such deed by the officer before whom it may be made."

² *Sibley v. Johnson*, 1 Mann. 380.

³ *O'Ferrall v. Simplot*, 4 G. Greene, 162; s. c. 4 Iowa, 381.

⁴ *Wickersham v. Reeves*, 1 Clarke, 413.

⁵ *Tiffany v. Glover*, 3 Iowa, 387; *Bell v. Evans*, 10 Iowa, 353; *Dickerson v. Davis*, 12 Iowa, 353; *Wickersham v. Reeves*, 1 Clarke, 413; *Cavender v. Smith*, 5 Clarke, 157.

⁶ Code, § 1207; Rev. 1860, § 2215.

⁷ *Grapengether v. Ferjervary*, 9 With. 163, 173. See ante, § 2. The certificate must show that the identity of the grantor is personally known to the officer. *Brinton v. Seevers*, 12 Iowa, 389.

⁸ *Chauvin v. Wagner*, 18 Misso. 531.

⁹ To the same effect, *Thomas v. Meir*, 18 Misso. 573. A substantial compliance with the statute is sufficient. *Alexander v. Merry*, 9 Misso. 514.

in the opinion, that a certificate which states that the wife "was examined whether she acknowledged that she executed the deed and relinquished her dower," and that "she acknowledged that she executed the deed and relinquished her dower," will pass her estate, if it conform to the statute in other respects. But if the certificate omit to state that she "relinquished her dower," it will be fatally defective, even though it set forth that "she executed the deed freely."¹ Under the Revised Code of 1835, a separate examination of the wife is essential to a valid relinquishment of dower; and the certificate of relinquishment must show the fact of such an examination.² In *McDowell v. Little*,³ the early legislation on this subject, was thus referred to: "In the case of *Lindell v. McNair*,⁴ this court held that a married woman might, in 1820, when this deed was executed, convey her land by conforming to the mode of executing and acknowledging deeds prescribed by our Acts of Assembly. The opinion also states, that 'the Act of 17th July, 1807, directs how conveyances of land shall be made and authenticated,' thus deciding that the mode prescribed in the Act of 1807, must be conformed to. That Act, by its terms, refers only to the execution and acknowledgment by married women, of deeds for the conveyance of their rights of dower, but the court evidently held that the same mode must be conformed to in order to pass any other interest of the wife in the land. In the case of *Reaume v. Chambers*,⁵ Judge Scott, held, that the case of *McNair v. Lindell*, decides nothing more than that a conveyance made by the husband and wife during the period between the introduction of the common law, on January 19, 1816, and the statute enabling husband and wife to convey real estate belonging to the wife, passed on the 22d June, 1821, in pursuance to the statute law then in force regulating the conveyance of married women's estates and the mode of relinquishing dower therein, will be effectual to convey the real estate belonging to the

¹ *Thomas v. Meir*, 18 Misso. 573. After setting forth the acknowledgment by husband and wife, the certificate proceeded as follows: "And the said Margaret, wife of the said Martin Thomas, being by me examined separately and apart from her husband, whether she executed said deed freely and voluntarily, and without the compulsion or undue influence of her said husband, acknowledged and declared that she is well acquainted with the contents of said deed, and that she executed the same freely and voluntarily, and without the compulsion or undue influence of her said husband."

² *Rogers v. Woody*, 23 Misso. 548.

⁴ *Lindell v. McNair*, 4 Misso. 380.

³ *McDowell v. Little*, 33 Misso. 523.

⁵ *Reaume v. Chambers*, 22 Misso. 52.

wife. In the present case, the deed is not executed in conformity to the statutes then in force regulating the conveyance of married women's estates, and the mode of relinquishing dower therein. It was proved only by the oath of a subscribing witness. There was no acknowledgment at all, and of course, no explanation to the wife and privy examination of her."¹

26. *Tennessee*. In the case of *Perry v. Calhoun*,² the certificate by commissioners, of the privy examination of a married woman, was in these words: "Agreeably to an order of county court to us directed, we certify that we privately examined Sarah Lidden, respecting her willingness to sign the within, and she declared she did it freely, without any force or compulsion whatever." This was held not sufficient to pass her title. The defects in the certificate were thus explained by the court: "It is to be observed that it does not appear what order was made, or by what county court, or in what character the commissioners were acting; neither is there any date to the certificate. It also does not appear that Sarah Lidden was a resident of a different county from that in which the deed was proven, or that she was so aged or infirm as to be unable to travel to the chief justice of the county, or to the county court, where alone such privy examination could be had, except in such cases as are provided for by the statutes then in force. Inasmuch as this mode of conveyance by privy examination of the *feme covert*, was introduced by statute in the place of one much more solemn, and better calculated to protect her rights, viz.: fine and recovery, great strictness must be required in enforcing the observance of the forms prescribed by the statutes. In the present case, so far as we can see, none of them have been observed, and we are constrained to hold that this deed did not pass the title of Sarah Lidden." In the case of *Rainey v. Gordon*,³ the record of a privy examination of a *feme covert* was in the following words: "The court proceeded to take the privy examination of the said Eliza W. Rainey, separate and apart from her husband, who says she executed the same freely and voluntarily, without fear or con-

¹ The mere addition of the words, "and relinquishes her dower in the premises," or the like, in a certificate of acknowledgment of a deed by a wife conveying her own estate, does not render the deed void as to her. *Delossers v. Paston*, 19 Misso. 425; *Perkins v. Carter*, 20 Misso. 465; *Chauvin v. Wagner*, 18 Misso. 531.

² *Perry v. Calhoun*, 8 Humph. 551.

³ *Rainey v. Gordon*, 6 Humph. 345.

straint." The court held this to be valid as a privy examination and acknowledgment of the execution of the deed.

27. *Alabama.* The case of *Dundas v. Hitchcock*,¹ decided in the Supreme Court of the United States, presented a question as to the requisites of a certificate of acknowledgment under the laws of Alabama. It was objected to the certificate there called in question, that in place of the words "as her voluntary act and deed, freely," it substituted the words "freely and of her own accord."² This was held a substantial compliance with the statute. The court said: "That the words of the acknowledgment have the same meaning, and are in substance the same with those used in the statute, it needs no argument to demonstrate; and that such an acknowledgment is a sufficient compliance with the statute to give validity to the deed of the wife, is not only consonant with reason, but as the cases cited by counsel show, supported by very numerous authorities. The Act requires a private examination of the wife to ascertain that she acts freely and not by compulsion of her husband, but it prescribes no precise form of words to be used in the certificate, nor requires that it should contain all the synonymes used in the statute to express the meaning of the legislature.³ In other acts of the same legislature, where a precise form of acknowledgment of certain deeds is prescribed, it is provided, that 'any certificate of probate or acknowledgment of any such deed, shall be good and effectual if it contain the substance, whether it be in

¹ *Dundas v. Hitchcock*, 12 How. U. S. 256.

² That part of the certificate which recited the separate acknowledgment of the wife, was as follows: "And also personally appeared before me, Charles A. Marston, Anne Hitchcock, wife of the said H. Hitchcock, who being examined privately and apart from her said husband, acknowledged that she signed, sealed, and delivered the said indenture of mortgage freely, and of her own accord, and without any fear, threats, or compulsion of her said husband."

³ The Alabama statute on this subject, referred to in this case, is as follows: "No estate of a *feme covert*, in any lands, tenements, or hereditaments, lying and being in this territory, shall pass by her deed or conveyance, without a previous acknowledgment made by her on a private examination before one of the territorial judges, or one of the justices of the county court, that she signed, sealed, and delivered the same as her voluntary act and deed, freely, without any fear, threats or compulsion of her husband, and a certificate thereof, written on or under the said deed of conveyance, and signed by the officer before whom it was made; and every deed or conveyance so executed and acknowledged by a *feme covert*, and certified as aforesaid, shall release and bar her right of dower, and be good and effectual to convey the lands, tenements, and hereditaments thereby intended to be conveyed." Aiken's Dig. 93, § 29.

the form or not, of that set forth in the first section of this Act."¹ The legislature have thus shown a laudable anxiety to hinder a construction of their statutes, which would require a stringent adherence to a mere form of words, without regard to their meaning or substance, and make the validity of titles to depend on the verbal accuracy of careless scriveners." But it has been held in the State courts, that an acknowledgment by a married woman, on a private examination, "that she signed, sealed, &c., of her own free will and accord, and without any force, persuasion, or threats from her said husband, and for the express purpose therein stated," is not a substantial compliance with the provisions of the statute² which require an acknowledgment "that she signed, sealed, and delivered" the deed, "as her voluntary act and deed, freely, and without any fears, threats, or compulsion of her said husband."³ And the certificate of the officer to the facts of the wife's examination and acknowledgment, is essential to the passing of the title, and can not be dispensed with by the courts.⁴

28. *North Carolina*. It is well settled in North Carolina that the deed of a *feme covert*, without a private examination according to the Act of 1751,⁵ is a mere nullity. To give validity to her deed, it must appear that a private examination was had pursuant to the Act. If the certificate of the clerk merely show that the deed was "acknowledged in open court and ordered to be registered," a private examination will not be presumed.⁶ So it must

¹ Clay's Dig. 153.

² *Ibid.* 155, § 27.

³ *Boykin v. Rain*, 28 Ala. 332. Where a bill to establish a lost deed alleges that the wife of the vendor had released her dower to the premises in question, if this allegation is not admitted, no decree can be made barring dower without evidence of a substantial compliance with the requirements of the law in force at the time, as to the mode in which married women should relinquish their dower interests. *Owen v. Paul*, 16 Ala. 130.

⁴ *McBryde v. Wilkinson*, 29 Ala. 662.

⁵ The Act of 1751, ch. 3, declares, "That all conveyances in writing, and sealed by husband and wife for any lands, and by them personally acknowledged before the chief justice, or in the court of the county where the land lieth, the wife being first privily examined before the chief justice or some member of the county court, appointed by said court for that purpose, whether she doth voluntarily assent thereto, and registered according to the directions of the laws of this province, shall be as valid in law to convey all the estate and title which such wife may have, or shall have in any lands," &c.

⁶ *Robinson v. Barfield*, 2 Murph. 390; *Burgess v. Wilson*, 2 Dev. L. 306; *Gilchrist v. Buie*, 1 Dev. & B. Eq. 346; *Jones v. Lewis*, 8 Ired. L. 70; *Lucas v. Cobb*, 1 Dev. & B. Law, 228; *Skinner v. Fletcher*, 1 Ired. L. 313; *Etheridge v. Ashbee*, 9

appear that a deed from husband and wife was acknowledged by the husband as well as the wife.¹

29. It is laid down in several of the adjudged cases that a conveyance by a married woman must, except in case of her inability to attend, be acknowledged by the husband and wife in open court; and that proof by witnesses of the execution is insufficient. It has been held, also, that the proper mode to bar the wife where she is able to attend, is for the husband and wife to acknowledge the deed personally in open court, and then for one of the court to take the privy examination of the wife; and if the wife can not attend, that the deed should be first proved as to the husband, and then a commission issued to two or more commissioners to take the privy examination of the wife.² In *Burgess v. Wilson*,³ where a justice was directed to take the private examination of the wife before the deed was proved as to either the husband or the wife, who, upon making his report, proved the execution of the deed by the husband and wife, and also certified as to her private examination, it was held that the deed was inoperative; and this ruling was affirmed in *Gilchrist v. Buie*.⁴ Subsequently it was decided, that in taking the probate of the deed of a married woman by a judge out of court, it is not necessary that the husband should personally acknowledge before the judge his execution of the deed. It is sufficient, the court said, if the execution by him be proved by witnesses. It was further determined not to be necessary for the certificate of probate to set forth that the deed was proved *before* the wife was privily examined, the whole probate appearing to have been taken at the same time.⁵ In the more recent case of *Pierce v. Wanett*,⁶ there was an order to take the private examination of a

Ired. L. 353; *Ives v. Sawyer*, 3 and 4 Dev. & B. 51. See *Green v. Branton*, 1 Dev. Eq. 504. Under the statute of 1751, a commission may issue where the wife resides in another State. *Pierce v. Wanett*, 10 Ired. 446.

¹ *Whitehurst v. Hunter*, 2 Hay. 401.

² *Burgess v. Wilson*, 2 Dev. L. 306; *Gilchrist v. Buie*, 1 Dev. & B. Eq. 346; *Jones v. Lewis*, 8 Ired. L. 70.

³ *Burgess v. Wilson*, *supra*.

⁴ *Gilchrist v. Buie*, *supra*. Approved also in *Pierce v. Wanett*, 10 Ired. 446.

⁵ *Joyner v. Faulconer*, 2 Ired. Eq. 386. In this case, the cases of *Whitehurst v. Hunter*, 2 Hay. 401; *Fenner v. Jasper*, 1 Dev. & Bat. 34; and *Sutton v. Sutton*, 1 Dev. & B. 582, were cited and approved; and the case of *Burgess v. Wilson*, 2 Dev. 306, was commented on and explained.

⁶ *Pierce v. Wanett*, 6 Jones, L. 162. See, upon the same point a case between the same parties reported in 10 Ired. L. 446.

feme covert, the probate of the deed as to the husband by a subscribing witness, and a commission and its return, certifying that the commissioners had taken the privy examination, and that the wife had declared that the deed was executed of her own free will and consent, and without any compulsion on the part of her husband; there was also an order of registration, everything appearing to have been done on the first day of a court. It was held that it would be taken that proof of the deed as to the husband occurred before the order and commission for examining the wife, especially as the commission recited that the deed had been proved, and that the probate and privy examination were sufficient.¹

30. A certificate of probate on the deed of A., a married woman, set forth that the deed "was exhibited in open court, and the execution thereof by" (the husband) "was proved by" (B., a subscribing witness,) "and acknowledged by" (A.,) "when, on motion in open court," (C.,) "one of the presiding justices was appointed to take the private examination of" (A.,) "as to her consent in signing the deed, who reported that she acknowledged to have signed it of her own free will and accord, without any compulsion from her said husband. Ordered to be recorded." It was held that the probate was sufficient to make the deed valid against the wife.²

31. A copy of the probate of a deed by the subscribing witness; also of the order made by a county court to appoint commissioners to take the private examination of a *feme covert* was indorsed on the deed itself, together with the report of the commissioners duly registered, though no other commission had issued to them. It was held that this was a substantial compliance with the Act of Assembly, and that the deed was duly authenticated.³

32. It is sufficient if the certificate of the private examination of a married woman state, that upon such examination she voluntarily *executed* the deed without saying that "she doth now voluntarily assent thereto."⁴ But if, upon the privy examination, the wife

¹ The court cite and approve *Joyner v. Faulconer*, 2 Ired. Eq. 386; and distinguish the case from *Burgess v. Wilson*, 2 Dev. 306.

² *Beckwith v. Lamb*, 13 Ired. 400; *Joyner v. Faulconer*, 2 Ired. Eq. 392, and *Etheridge v. Ferebee*, 9 Ired. 312, cited and approved. *Etheridge v. Ashbee*, 9 Ired. 353, cited and commented on.

³ *Hathaway v. Davenport*, 2 Jones, L. 152.

⁴ *Etheridge v. Ferebee*, 9 Ired. 312. It is immaterial whether the acknowledgment, or private examination of the wife be first recorded. *Ibid.*

state that she was willing to convey when she executed the deed, but that she had changed her mind, and was then unwilling, the assent of the wife can not be certified.¹

33. Where a deed was acknowledged by husband and wife, and two justices of the peace thereupon took the private examination of the wife, and reported the result to the court, and the court acted upon the report, it was held that the inference was irresistible that the two justices were members of the court, appointed for that purpose, though no special order of appointment appeared.²

34. A deed made by husband and wife, to one who dies previously to the probate and privy examination of the wife, is good from the time of its execution and delivery to the bargainee, provided that, after his death, it is duly acknowledged, and the privy examination of the wife taken, and the deed registered.³

35. Where a certificate on the back of a deed by husband and wife, for the wife's land, purported to be of an acknowledgment in the county court, and an examination of the wife before some member of the court, but was subscribed with the name of a judge of the superior court, it was held ineffectual to bind the wife.⁴

36. A deed of husband and wife, dated March 1, 1834, was offered in evidence. To prove the due execution of the deed by the wife, a commission issued by the court to two justices of the peace to take her private examination, dated February 17, 1834, reciting that the deed had been *theretofore* executed by the husband and wife, together with the return of the justices indorsed on the deed of March 1, 1834, was offered in evidence. It was held, that the deed of March 1, 1834, was not the deed intended to be submitted to the commissioners, and that their certificate indorsed on that deed, was made without authority, and therefore void, and consequently that the deed did not pass the title of the wife.⁵

37. If a commission issue to take the private examination of the wife, it must appear, either in the order for the commission, or in the commission itself, that she was an inhabitant of another county, or so aged or infirm as to be unable to travel to court.⁶ The recital in the commission, "that it has been represented to our said court

¹ Etheridge v. Ferebee, 9 Ired. 312.

² Ibid.

³ Hall v. Chang, 2 Jones, L. 440.

⁴ Barbee v. Taylor, 6 Jones, L. 40.

⁵ Rich v. Beeding, 2 Iredell, 240.

⁶ Fenner v. Jasper, 1 Dev. & B. Law, 34; Barfield v. Combs, 4 Dev. L. 514.

that M. W. (the *feme covert*) is indisposed, so that she can not travel to our said court," is as effectual as if the same recital had been made in the order of the court directing the commission to issue.¹ And the words "indisposed, so that she can not travel," taken in reference to the subject matter, must be understood to mean, "unable to travel from sickness."² A private examination taken by one commissioner only, is insufficient.³ And it seems that it must appear that the commission and the certificate of the commissioners were returned to the court, approved, and ordered to be registered in order to render the deed valid against the wife.⁴

38. In *Lucas v. Cobb*,⁵ it was held that a certificate of commissioners appointed in another State, to take the private examination of a married woman touching the free and voluntary execution of her deed, which states merely that "she acknowledged the same to be her act and deed in due form,"⁶ is not a compliance with the Act of 1810,⁷ which requires a certificate of her acknowledgment that she executed the deed freely and "doth voluntarily assent thereto." The court thus noticed the objections to the certificate: "The acknowledgment of the deed by the *feme covert* before the commissioners, does not find and disclose the very essential and important fact that she executed the deed freely, and voluntarily assented thereto. The Act of 1810, expressly requires that the judge, or commission in another State or Territory, shall privately examine the *feme covert* 'whether she doth voluntarily assent thereto, and an attestation of such acknowledgment shall be indorsed on, or affixed to, such deed or commission, by the judge or commissioners.' "

39. Where the commissioners certify that they took "the *private examination*" of the wife, and that she acknowledged that "she executed the deed without any compulsion from her husband or any other person," this is sufficient, without saying that she was exam-

¹ *Skinner v. Fletcher*, 1 Ired. L. 313.

² *Ibid.*

³ *Barfield v. Combs*, 4 Dev. L. 514.

⁴ *Fenner v. Jasper*, 1 Dev. & B. Law, 34.

⁵ *Lucas v. Cobb*, 1 Dev. & Bat. L. 228.

⁶ "State of Virginia, Brunswick county, to wit: Pursuant to the foregoing commission to us directed, we did this day examine Rebecca Lewis, privily and apart from her husband, touching her acknowledgment of the indenture mentioned in the foregoing commission, and hereto annexed, and the said Rebecca acknowledged the same to be her act and deed in due form. Given under our hands and seals this the 28th day of May, 1822."

⁷ Rev. ch. 791.

ined "privily and apart from her husband." The phrases, "privy examination," "private examination," and "examination separate and apart from her husband," are indifferently used in the Acts of Assembly.¹ But where a deed from husband and wife had on it only the following certificate from the clerk of the county court as to its execution, to wit: "The private examination of H. J., wife of J. C. J., taken by Charles A. Hill, a member of this court, which being satisfactory, is ordered to be recorded," and signed, "C. A. Hill, J. P.;" and proof of the execution of the deed, by the subscribing witness, together with an order of registration, it was held, that the interest of the wife in the lands did not pass.² "There was no acknowledgment," said the judge who announced the decision, "of the execution of the deed in court, either by her or her husband. Nor indeed, so far as the certificates or the conveyance show, does it appear that she ever has legally acknowledged the execution of the deed, or been privily examined, as required." So the entries shown in the note,³ indorsed on the deed of a married woman, were held to afford no evidence that she had been privily examined as required by law.⁴

40. *South Carolina*. It was held in the case of *Brown v. Spann*,⁵ that the provisions of the Act of 1795, prescribing the mode by which the interest of a married woman in real estate may be conveyed, must be strictly followed, or she will not be barred.

¹ *Skinner v. Fletcher*, 1 Ired. L. 313.

² *Jones v. Lewis*, 8 Ired. L. 70.

³ "State of North Carolina, Currituck county, February Term, 1832. Personally appeared Lydia Cook, wife of John Cook, and in open court acknowledged that she assigned the within deed of her own free will without any constraint whatever.

"W. D. BARNARD.

"State of North Carolina, Currituck Sessions, February Term, 1832. This deed from John Cook and Lydia to Samuel Ferebee, was exhibited and proved in open court, by John L. Scurr, subscribing witness. At the same time, Lydia Cook, the *feme covert*, personally appeared in open court, and being privately examined by W. D. Barnard, one of the court appointed for that purpose, who reported that the said Lydia Cook acknowledged the execution of said deed of her own accord, and without any constraint whatever, &c. On motion ordered to be registered.

"S. HALL, C. C. C."

There was also the following entry on the minute docket of the same term: "A deed from John D. Cook and wife Lydia to Wm. E. Ethridge, was proven as to John Cook and wife, by the oath of John Scurr, a witness thereto, and her private examination taken in open court. Ordered registered."

⁴ *Etheridge v. Ashbee*, 9 Ired. Law, 353.

⁵ *Brown v. Spann*, Mills, Con. Court, 240. See *Gough v. Walker*, 1 N. & M. 469; *Hillegas v. Hartley*, 1 Hill, 106; *Harrel v. Elliott*, Taylor, 139.

41. *Mississippi*.¹ In Mississippi, as in most of the States, it is not necessary that the certificate of acknowledgment should be in the precise words of the statute. If it be in effect in the form prescribed, it will be sufficient.²

42. In *Warren v. Brown*,³ it was held, that the acknowledgment of the deed of a married woman, must be taken and certified to have been taken, not only "separate and apart from her husband," but on "a private examination." In *Love v. Taylor*,⁴ the certificate of the acknowledgment of a married woman to a deed relinquishing her dower in land, which stated that the "said E., being examined separate and apart from her husband, acknowledged that she signed, sealed, and delivered the same voluntarily, without any threats, fear, or compulsion of her said husband," was held to be a sufficient compliance with the statute. And the court declared, that it was not absolutely necessary to a valid relinquishment of dower, that the words on "private examination," should be inserted in the certificate, but only that it should appear that the acknowledgment was made out of the presence of the husband. It is essential, however, that the certificate show, not only that the wife *signed*, but that she *sealed* and *delivered* the deed without fear, threat, or compulsion of her husband.⁵

43. *Arkansas*. In this State, it is necessary that a substantial compliance with the requisites of the statute appear affirmatively in the certificate. Words of equivalent import may be used; as where, instead of certifying that the party had executed the deed, the terms "signed, sealed, and delivered the same," are employed. But important words not contained in the certificate, can not be supplied by intendment; as where the words "for the consideration and purposes therein set forth," prescribed by the statute, are omitted.⁶

44. *Oregon*. The statute of Oregon provides, that the certificate of acknowledgment shall set forth the matters required to be done, known, or proved.⁷

¹ A clerk of the probate court is authorized to take the acknowledgment of married women. *James v. Fisk*, 9 S. & M. 144; *Raven v. McGuire*, Ibid. 34. The same power is conferred upon a deputy clerk of the probate court, acting under the seal of the court. *Raven v. McGuire*, 9 S. & M. 34, Sharkey, Ch. J., dissenting.

² *Halls v. Thompson*, 1 S. & M. 443; *Pickett v. Doe*, 5 S. & M. 470; *Morse v. Clayton*, 13 S. & M. 373; *Love v. Taylor*, 26 Missis. 567.

³ *Warren v. Brown*, 25 Missis. 66.

⁴ *Love v. Taylor*, 26 Missis. 567.

⁵ *Toulmin v. Heidelberg*, 32 Missis. 268.

⁶ *Jacoway v. Gault*, 20 Ark. 190.

⁷ Stat. Oregon, 1855, p. 521, § 21.

Parol evidence inadmissible to show a proper acknowledgment.

45. It is settled by numerous authorities, that where the certificate of acknowledgment of a deed is defective, it can not be shown by evidence *aliunde*, that everything required by statute was done in fact, and that the officer through mistake, omitted to certify a part. The sufficiency of the acknowledgment is to be determined solely by what appears on the face of the certificate.¹ Nor are parol declarations of the wife that she executed the deed voluntarily, and if it was not sufficient, would execute and acknowledge it again, or do any other act to make it good, admissible.² In an early case in Alabama, it was held, that the body of a deed might be referred to to support a defective certificate of acknowledgment.³ But more recently, the court was in doubt whether parol evidence could be admitted to apply and identify the reference of the words "foregoing instrument," as used in a certificate of the wife's examination and acknowledgment, written on a sheet of paper containing both a relinquishment of dower by the wife and a deed signed by husband and wife.⁴ In Maine, where no separate examination or

¹ *Watson v. Bailey*, 1 Binn. 470; *Jamison v. Jamison*, 3 Whart. 457; *Jourdan v. Jourdan*, 9 S. & R. 268; *Barnet v. Barnet*, 15 S. & R. 72; *Ridgely v. Howard*, 3 Har. & McH. 321; *Elwood v. Klock*, 13 Barb. 50; *Pendleton v. Button*, 3 Conn. 406; *Hayden v. Wescott*, 11 Conn. 129; *Harrel v. Elliott*, Taylor, (S. C.) 139; *Scanlan v. Turner*, 1 Bailey, (S. C.) Law, 421; *Chauvin v. Wagner*, 18 Misso. 531; *Elliott v. Peirsol*, 1 McLean, 11; s. c., 1 Peters, U. S. 328; *Tomlin v. McChord*, 5 J. J. Marsh. 135; *Barnett v. Shackelford*, 6 J. J. Marsh. 532; *Blackburn v. Pennington*, 8 B. Mon. 217; *Silliman v. Cummins*, 13 Ohio, 116; *Smith v. Hunt*, Ibid. 260, 268; *O'Ferrall v. Simplot*, 4 Iowa, 381; s. c., 4 G. Greene, 162; *Wilkinson v. Getty*, 13 Iowa, 157. Parol evidence is not admissible to show that the acknowledgment of a deed by a sheriff had been fraudulently altered by the prothonotary's clerk. *Hoffman v. Coster*, 2 Whart. 453. And it is said in an Ohio case, that if the officer give himself no official character in his certificate, it is doubtful whether parol evidence is admissible to supply the defect. *Johnston v. Haines*, 2 Ohio, 55. But in Pennsylvania it has been decided, that an omission of this kind may be supplied by parol proof that the person before whom the acknowledgment was taken, was an acting justice of the peace at the time. *Scott v. Gallagher*, 11 S. & R. 347; *Bennet v. Paine*, 7 Watts, 334. The same ruling has been made in the courts of the United States. *Van Ness v. Bank U. S.*, 13 Peters, 17, 21; *Shults v. Moore*, 1 McLean, 520; *Rhoades v. Selin*, 4 Wash. C. C. R. 715.

² *Watson v. Bailey*, 1 Binn. 470; *Adams v. Buford*, 6 Dana, 406.

³ *Bradford v. Dawson*, 2 Ala. 203.

⁴ *McBryde v. Wilkinson*, 29 Ala. 662; 21 Ala. 296. If admissible, the evidence may be received at law. Ibid.

acknowledgment of the wife is required,¹ admissions made during widowhood, are competent secondary evidence to prove the execution of the deed by the wife.²

Defective acknowledgment not aided in equity.

46. As it is not competent to show by parol that all the requisites of the law were complied with by the officer taking the acknowledgment, it follows that a court of equity possesses no power to act upon such evidence, or to correct or amend a defective certificate.³ "If parol evidence should be admitted to establish it," say the Kentucky court, "then an acknowledgment by a *feme covert* before witnesses *in pais*, when aided by the chancellor, would be as good as an acknowledgment before the officer designated by law, and making up a record thereof in the manner prescribed; and thus the guarded provisions of our statutes might be substituted by a new branch of equity jurisdiction."⁴

47. In Alabama, it is held, that under the Act of 1803,⁵ the certificate of the officer to the facts of the wife's examination and acknowledgment, being intended to afford additional protection to her rights, by guarding against the uncertain recollection of witnesses, is essential to the passing of the title, and can not be dispensed with by the courts.⁶ Where a deed of husband and wife, and a relinquishment of dower by the wife, are written on the same sheet of paper; and the officer's certificate of the wife's examination and acknowledgment is written under the relinquishment, and thereby made to apply to it, a court of equity can not, on the ground of mistake, apply the certificate to the deed; such a bill is, in sub-

¹ Ante, § 2.

² Frost v. Deering, 21 Maine, 156.

³ Elliott v. Peirsol, 1 Peters, U. S. 328; s. c. 1 McLean, 11; Chauvin v. Wagner, 18 Misso. 531; Campbell v. Taul, 3 Yerger, 548; Barnett v. Shackelford, 6 J. J. Marsh. 532; Blackburn v. Pennington, 8 B. Mon. 217; Silliman v. Cummins, 13 Ohio, 116; O'Ferrall v. Simplot, 4 Iowa, 381. Nor does it make any difference that the husband and wife received the consideration. Barrett v. Tewksburg, 9 Cal. 13. But it is held in Indiana, that a certificate may be amended by the officer by whom it was made. Jordan v. Corey, 2 Ind. 385. See, however, Elliott v. Peirsol, 1 Peters, U. S. 328. Upon the subject of the legislative power to pass healing statutes curing defective acknowledgments, see the next chapter.

⁴ Barnett v. Shackelford, 6 J. J. Marsh. 532, 534. See Applegate v. Gracy, 9 Dana, 215.

⁵ Clay's Dig. 155, § 27.

⁶ McBryde v. Wilkinson, 29 Ala. 662.

stance and effect, a bill for aiding or supplying the defective execution of a statutory power.¹

Re-acknowledgment of deed defectively certified.

48. If husband and wife jointly execute a deed, and the certificate of the officer taking the acknowledgment is defective as to the wife, she may during the coverture go before the same or a different officer, and upon proper examination again acknowledge the deed; and if the acknowledgment thus taken is properly certified, the conveyance will thereby be perfected.² So if there be no acknowledgment by the wife during the lifetime of the husband, an acknowledgment by her after his death will give effect to the deed as an original conveyance from that time.³ But an acknowledgment so made will not relate back to the time of the original execution of the deed and divest the estate of the wife as of that date;⁴ and if, between the time of the execution of a conveyance of the wife's land and the acknowledgment by her, a second deed be properly executed and acknowledged, the second grantee will take the estate.⁵

Re-delivery after the husband's death, of deed defectively acknowledged.

49. If a deed be invalid as to the wife, merely because the officer has failed to observe the requisitions of the statute relating to the separate examination and acknowledgment of deeds by married women, it may be made effectual by a ratification and re-delivery by her after her husband's death. For if the form of the acknowledgment be such as will bind a *feme sole*, it is only necessary that she should re-deliver it after she has become discoverd to make it the deed of a *feme sole*. And parol evidence is admissible to show such re-delivery. So circumstances may be proved from which it may be inferred.⁶ But nothing that would not constitute a valid

¹ *McBryde v. Wilkinson*, 29 Ala. 662.

² *Newell v. Anderson*, 7 Ohio St. 12. See *Applegate v. Gracy*, 9 Dana, 215.

³ *Jackson v. Stevens*, 16 John. 110; *Doe v. Howland*, 8 Cow. 277. See *Price v. Hart*, 29 Misso. 171.

⁴ *Jackson v. Stevens*, 16 John. 110; *Doe v. Howland*, 8 Cow. 277.

⁵ *Jackson v. Stevens*, 16 John. 110.

⁶ *Jourdan v. Jourdan*, 9 S. & R. 268; *Miller v. Shackelford*, 3 Dana, 289; *Smith*

delivery in the first instance, or amount to a new grant would be equivalent to a second delivery. Mere acquiescence on the part of the wife would not have that effect.¹ Nor would a mere parol adoption be sufficient.²

Certificate of the officer not conclusive upon the wife.

50. It seems clear that a certificate of acknowledgment does not conclude the party to be affected by the deed, but that he may contest its validity and the force and effect of the formal proof.³ The propriety of extending the benefit of this rule to married women is obvious; and it is accordingly well settled, that as against volunteers and purchasers with notice, the wife may avoid her deed by showing that the certificate is false in fact, and that her acknowledgment was obtained by fraud or duress.⁴

51. In the case of *Schrader v. Decker*,⁵ the circumstances under which the deed was executed are thus stated by the court: "It was given to a tavern-keeper, partly in payment of a profligate husband's debt, contracted in a course of drunkenness and debauchery; and it was thus procured: Means, the grantee, attended by his wife, a man called Dinninger, who had no proper concern with the business, and an inexperienced justice picked up by the way, repaired to the house of the husband, while the wife was in the throes of child-birth. Means, his wife, and Dinninger, entered the sick woman's chamber, and met, in the first instance, the repulse they

v. Shackleford, 9 Dana, 452; *Price v. Hart*, 29 Misso. 171; *Carter v. Straphan*, Cowp. 201. See *Evans v. Evans*, 3 Yeates, 507; *Share v. Anderson*, 7 S. & R. 43.

¹ *Miller v. Shackleford*, 3 Dana, 289.

² *Price v. Hart*, 29 Misso. 171.

³ *Jackson v. Schoonmaker*, 4 John. 161; *Jackson v. Hayner*, 12 John. 469, 472; *Priest v. Cummings*, 16 Wend. 617, 631.

⁴ *Jamison v. Jamison*, 3 Whart. 457; *Barnet v. Barnet*, 15 S. & R. 72; *Schrader v. Decker*, 9 Barr, 14; *Louden v. Blythe*, 4 Harris, 532; *Louden v. Blythe*, 3 Casey, 22; *Michener v. Cavender*, 2 Wright, 334; *Central Bk. v. Copeland*, 18 Md. 305; *Harkins v. Forsythe*, 11 Leigh, 294; *Hartley v. Frosh*, 6 Texas, 208; *Hays v. Hays*, 5 Rich. 31; *Stone v. Montgomery*, 35 Missis. 83; *Lucas v. Cobb*, 1 Dev. & B. Law, 228; *Montgomery v. Hobson*, Meigs, 437; *Williams v. Robson*, 6 Ohio St. 510, 515; *Conover v. Porter*, 14 Ohio St. 450; *Baldwin v. Snowden*, 11 Ohio St. 203; *Pumphrey v. Pumphrey*, 4 West. Law Month. 40; *O'Ferrall v. Simplot*, 4 Iowa, 381; *Dodge v. Hollinshead*, 6 Minn. 25; *Annan v. Folsom*, Ibid. 500. *Contra*, *McNeely v. Rucker*, 6 Blackf. 391. But now by statute the same rule is adopted in Indiana. 1 Ind. Rev. Stat. 1852, p. 237, § 32. See *Bissett v. Bissett*, 1 Har. & McH. 211; *Ridgely v. Howard*, 3 Har. & McH. 321.

⁵ *Schrader v. Decker*, 9 Barr, 14.

had reason to expect. It was not until she had been badgered during two hours, and worn out by the importunity of her husband, as well as deceived with false assurances by the rest of the party, of her husband's right and ability to redeem the land, that they worked her to their will. The justice was then called in; and having barely asked her in the presence of her husband, whether the instrument she had executed was her deed, signed the certificate which had been brought along for the occasion." For excluding evidence of these facts, the judgment of the court below was reversed. "There was not even a plausible objection to the evidence proposed," the chief justice proceeded, "except the supposed impolicy of allowing the certificate of a wife's separate examination to be falsified by parol evidence. Such evidence is undoubtedly attended with a greater or less degree of risk in every case; but it is indispensable to the detection of fraud, even in a record against which the law allows of no direct averment. Our statutory provision for the wife's conveyance by joinder with her husband, and acknowledgment on separate examination, is a substitute for a fine, by which alone the common law allowed her to part with her land; and it is true, as we read it in Sheppard's Touchstone, p. 9, that, 'if there be any woman that hath a husband (and) that doth join with her husband in the conveyance, the judges or commissioners must take care that they do examine her whether she be willing, and do part with her right willingly, or by compulsion of her husband; for albeit she may be made to do it by compulsion of her husband, yet hath she no way to relieve herself from it when it is done.' But it is said in 1 Madd. Ch. 266, that if *fraud* were practiced, equity would relieve against it; which is certainly true, for no separate examination can guard against that. The principle is no more than the rudimental one, that fraud vitiates every assurance, whether by matter of record, or *in pais*; and even had the conveyance in this instance been by fine, it would have been open to impeachment on that ground. But as the equity side of our courts of law is not broad enough to admit of relief by bill, we are compelled to give effect to the principle by pleading or evidence, as the court below ought to have done. But we would deprive married women of all substantial protection did we give to the separate examination of a judge, or a justice of the peace, the conclusive effect of an examination by commissioners to levy a fine, which is much more careful, private, and searching. Every one conversant with the subject,

knows the inutility of a separate examination under our statute, even by the most careful, and how often the form of it is hurried over almost in the presence of the husband, or, as in the case before us, dispensed with altogether. Even where the magistrate is too conscientious to be satisfied with less than full and unreluctant acquiescence, the husband may take her to a less scrupulous one. The necessities of justice, therefore, demand that the transaction be open to objection, not only for fraud, but concealed duress ; and the case presented is a rank compound of both."

52. The same doctrine was applied to the case of *Louden v. Blythe*;¹ and it was further held, that if the grantee have knowledge of facts calculated to put him on inquiry as to the manner in which the acknowledgment was obtained, he must abide the consequences. The court said: "The justice who takes and certifies the acknowledgment of the wife to a deed, is acting judicially. He is the commissioner and organ of the law, intrusted with the duty of seeing that it is her act and deed, and that she did voluntarily and of her own free will and accord, without any coercion or compulsion of her husband, sign, &c. His duty is an important one to the wife and her representatives ; and it is a responsible one to the public who are interested that the law be faithfully administered. We can not cast into oblivion our knowledge that this duty is often, by justices of the peace, and sometimes by other judicial officers, as has been said, 'hurried over almost in the presence of the husband.' And when the examination is out of the presence of the husband, the justice seems to think he has only to read over, in a hurried manner, the prepared form of acknowledgment which he has in his hand, and if open resistance is not made by the dependent wife, the acknowledgment is certified in due form, with all its particulars. There is no free and searching inquiry by the magistrate as to the free will and consent with which she is parting with her estate to satisfy the demands of an improvident and importunate husband. The law intends that he should do what is enjoined, and he certifies under his hand and seal as a judicial officer, that all was done in conformity to law. . . . A regard to the policy of the law, for the security of titles, and the protection of the rights of property which are passed by conveyances and assurances of which these acknowledgments and certificates are a common part, will restrain this

¹ *Louden v. Blythe*, 4 Harris, 532.

court from allowing such acknowledgments to be impeached by parol evidence, contradicting the facts certified, in the absence of fraud and imposition; and where there are fraud and imposition alleged, the knowledge of it ought to be brought home to the grantee, or of such circumstances within his knowledge of the want of free will and consent on the part of the wife, as should lead him to inform himself of the reality of a free execution and acknowledgment of the wife whose property was to be divested. Where the grantee has knowledge of facts to put him on that inquiry, if silent and inactive on the subject, it is at his peril."

53. The case was brought a second time before the court, with the same result.¹ "A married woman may convey or mortgage her land," said Black, J., "by joining with her husband in a deed for that purpose. But to make such a deed valid, it is necessary to show by legal evidence that no fraud was practiced upon her, but that she executed it with a full knowledge of its meaning, purpose, and intent. It must also be shown that her will was perfectly free, and that her mind accorded with the act. If he uses his influence and power in such manner as to control her unduly, or so as to make her act under his will and not her own, the deed is void. I do not say that it will be vitiated by the mere fact that she yields to his persuasions, even where she does so against her better judgment. But there must be no imprisonment of her mind, and no unfair advantage taken of her weakness. She must act voluntarily, and not by compulsion, moral or physical. These facts are to be proved in one way only—that is, by the certificate of a judge or justice that he examined her, not in the presence of her husband, but separately,—that he made the contents of the deed fully known to her,—that she declared her execution of it to be voluntary, and free from every sort of coercion. Such a certificate is conclusive in favor of a grantee who has accepted the deed in perfect good faith, and paid his money without knowing or having any reason to suspect that it is untrue. But if it be in point of fact false, and if the grantee knew it to be false, or if knowledge can be brought home to him of any circumstance which would put an honest and prudent man upon inquiry, then it may be contradicted by parol evidence. When the certificate of the acknowledgment is overthrown by proof that the examination of the woman was made

¹ *Louden v. Blythe*, 3 *Casey*, 22.

in the presence of the husband, that she was under the influence of fraud or coercion, or that she was not properly informed of the nature of the transaction, it goes for nothing."

54. It has been also held that in a case of this kind, a mortgagee is not to be regarded as such a *bona fide* purchaser as to render it necessary to prove notice to him of the fraud or mistake.¹ "To carry the doctrine of notice to such an extent," observed the court in *Michener v. Cavender*, "would subvert all law and justice. A purchaser of real estate who finds the deeds in the channel of the title all duly acknowledged, is certainly not required to go up the stream and inquire of every married woman if she executed her deed voluntarily and acknowledged it according to law; and if he pay his money on the faith of such title-deeds he is to be protected, and this probably is all that was meant by what judges have said about purchasing without notice. But a mortgagee is not a purchaser of an estate, though for the purpose of the recording Acts he is sometimes treated as one. He acquires neither an equitable nor a legal estate in the premises mortgaged. He is simply a lien creditor—a holder of a security for money. His assignee takes the mortgage subject to all defences, unless he inquire of the mortgagor and learn that there are none. And he is in no better condition than his assignee."

55. In North Carolina, an order that a deed of a married woman, with the accompanying commission and certificates, be registered, is not conclusive that all the requirements of the statute have been complied with; and the omission of all or any of them may be shown when the deed is offered in evidence upon any trial.² In Iowa,³ and Kansas,⁴ it is provided by statute that neither the certificate of acknowledgment of a conveyance, nor the record nor transcript thereof, shall be conclusive evidence of the facts therein recited. A similar statute is in force in Arkansas.⁵

56. It is laid down in some of the cases which have been referred to on this subject, that the acknowledgment of the wife may be invalidated by showing that her examination was in fact taken in

¹ *Michener v. Cavender*, 38 Pa. St. (2 Wright), 334. But see *Baldwin v. Snowden*, 11 Ohio St. 203. See, also, *Conover v. Porter*, 14 Ohio St. 450.

² *Lucas v. Cobb*, 1 Dev. & B. Law, 228.

³ Stat. Jan. 4, 1840; Code, § 1230; *O'Ferrall v. Simplot*, 4 Iowa, 381.

⁴ Comp. Laws Kansas, 1862, p. 357, § 27.

⁵ Dig. Stat. Ark. 1858, p. 269, § 28.

the presence of her husband, and not separately and apart from him, as required by the statute. This doctrine is denied in other cases. Thus, it has been held in Mississippi, that although fraud and duress by the husband and purchaser in procuring the acknowledgment by the wife, might vitiate the deed, yet the mere fact that they were present, though improper and irregular, is not of itself evidence of such fraud.¹ So it has been determined in Texas, that the certificate of the privy examination of the wife is conclusive, in the absence of fraud, imposition, or combination.² And it was said in that case, that "where the certificate of the privy examination of a married woman is in due form, in order to impeach its veracity, it is not sufficient to allege that there was no privy examination, that the contents were not made known to her, etc.; the certificate is conclusive in the absence of an allegation of fraud, or imposition—as, for instance, that there was a fraudulent combination between the notary and the parties interested." So in Ohio,³ and Virginia,⁴ it has been decided, that a statutory certificate of the acknowledgment of a conveyance made by husband and wife, is, in the absence of fraud, conclusive evidence of the facts therein stated. And the failure of the husband to disclose to his wife the character of a mortgage which she executed at his request, and in entire ignorance of its contents, the grantee not being present, and having no reason to suspect imposition, does not constitute such fraud as will enable her to contradict by parol, the certificate of acknowledgment.⁵ In Kentucky, if the certificate show that the acknowledgment was made in the presence of the husband, it will, for that reason alone be declared invalid.⁶ "It does not appear," remarked the court in the case referred to, "that he used any influence to induce her to make the acknowledgment. On the contrary, we infer that he did not wish her to make it. But that is not material. The statute requires the acknowledgment of a married woman to be made separately and apart from her husband, whether in opposition to, or in accordance with his wishes."

57. The declarations of the wife of her unwillingness to execute the deed, made immediately before and at the time of the acknowl-

¹ *Stone v. Montgomery*, 35 Missis. 83.

² *Hartley v. Frosh*, 6 Texas, 208.

³ *Baldwin v. Snowden*, 11 Ohio St. 203.

⁴ *Harkins v. Forsythe*, 11 Leigh, 294.

⁵ *Baldwin v. Snowden*, 11 Ohio St. 203.

And see *McHenry v. Day*, 13 Iowa, 445.

⁶ *Allen v. Shortridge*, 1 Duvall, (Ky.) 34.

edgment, though not in the presence of the grantee, are admissible in evidence as part of the *res gestæ*.¹

58. A wife may avoid her deed, except as against an innocent purchaser for value, not only where the acknowledgment has been obtained by fraud or duress, but also where she has been induced to voluntarily join in its execution by fraudulent representations as to the true character of the transaction.² Thus, if a married woman be persuaded by fraudulent statements as to the nature of the consideration her husband is to receive, to join in a conveyance of his land, she will not be barred of her dower, except as against a *bond fide* purchaser without notice of the fraud.³ So where husband and wife joined in the execution and acknowledgment of the blank form of a deed designed to be thereafter filled up in such manner as to convey a small piece of ground, and the husband, without the knowledge or consent of his wife, afterwards filled up the deed so as to convert it into a mortgage upon a valuable tract of land for the security of a large indebtedness, the wife was permitted to recover her dower against the mortgagee, although he had acted in good faith, and had no notice of the fraud practiced upon her.⁴ But to set aside the deed of a married woman regular upon its face, the proof of fraud in its procurement should be clear and satisfactory, especially after the lapse of many years from the date of the transaction.⁵

59. Upon the principle that a public officer, after performing an official act, should not be permitted to defeat it by impeaching his own official certificate, it is held, that the certificate of acknowledgment of a conveyance can not be falsified by the testimony of the officer who made it.⁶

¹ Louden v. Blythe, 4 Harris, 532; s. c. 3 Casey, 22; Hays v. Hays, 5 Rich. 31.

² Pumphrey v. Pumphrey, 4 West. Law Month. 40; Williams v. Robson, 6 Ohio St. 510, 515; Conover v. Porter, 14 Ohio St. 450; Montgomery v. Hobson, Meigs (Tenn.), 437. She may also show that a deed bearing date and purporting to have been executed by her husband prior to the marriage, was in fact made during the coverture, and ante-dated, in order to override the title of dower. Costigan v. Gould, 5 Denio, 290.

³ Pumphrey v. Pumphrey, 4 West. Law Month. 40.

⁴ Conover v. Porter, 14 Ohio St. 450. See Drury v. Foster, 2 Wallace, U. S. 24.

⁵ Montgomery v. Hobson, Meigs (Tenn.), 437; Williams v. Robson, 6 Ohio St. 510, 515.

⁶ Central Bank v. Copeland, 18 Md. 305; Stone v. Montgomery, 35 Missis. 83; Harkins v. Forsythe, 11 Leigh, 294.

CHAPTER XIV.

CURATIVE STATUTES.

1. It has been shown in the preceding chapter,¹ that for a number of years after the first settlement of the country, many of the colonies neglected to adopt statutes regulating conveyances by married women; and that in consequence of such neglect, a loose and unsettled practice prevailed in the execution and acknowledgment of deeds by that class of persons. Afterwards, when questions were made as to the validity of titles, it was thought expedient, if not indeed necessary, to enact healing laws confirming previous conveyances, and curing defects supposed to exist therein by reason of some technical informality in their execution. Statutes of this character were adopted at an early day in Maryland,² New York,³ Pennsylvania,⁴ North Carolina,⁵ South Carolina,⁶ Georgia,⁷ Arkansas,⁸ Connecticut,⁹ and Delaware.¹⁰ The power of legislative bodies to pass laws of this description, has been much questioned on constitutional grounds; but it is now settled by the clear preponderance of authority, that no valid objection exists to its exercise.

2. In an early Maryland case, it was held that the statute of 1715, ch. 47, cured no defects in the acknowledgments of deeds made under previous laws.¹¹ In New York, in a case determined a few years afterwards,¹² the statute of that State passed in 1771,¹³

¹ Ante, ch. xiii., § 2.

² 1663, ch. 7; 1715, ch. 47; 1 Maxcy, p. 127. See, also, 1 Dorsey, 549, 630; 2 Dorsey, 1195, 1023.

³ Act of Feb. 16, 1771.

⁴ Act of April 3, 1826.

⁵ Laws N. C. p. 143.

⁶ Laws S. C. p. 132.

⁷ Acts of Georgia, 63; Act of April 24, 1760, 1 Laws Geo. 112.

⁸ Clay's Dig. p. 154, §§ 16, 17.

⁹ Laws Conn. 265.

¹⁰ Laws Del. 144; 4 Laws Del. 460.

¹¹ *Corporation, &c. v. Hammond*, 1 Har. & J. 580, (1805).

¹² *Jackson v. Gilchrist*, 15 John. 89, (1818).

¹³ "An Act to confirm certain ancient conveyances, and directing the manner of proving deeds to be recorded. Passed the 16th February, 1771.

"Whereas, it has been an ancient practice in this Colony to record deeds concerning real estates, upon the previous acknowledgment of the grantors, or proof made by one of the subscribing witnesses of the execution of the instruments before a

received a more liberal interpretation. An acknowledgment taken in 1711, and alleged to be defective in not showing a separate examination of the wife,¹ was held to be within the operation of that Act. But in arriving at this conclusion the court laid considerable stress upon the fact that the acknowledgment in question was taken at a time when there was no statute regulation on the subject in force; thus rendering it highly proper that conveyances executed according to the prevailing usage should receive legislative sanction. In disposing of one of the objections urged against the enactment, the court said: "It has also been contended that this Act interfered with the vested rights of Ann Bridges; and on this ground ought to be declared null and void. Without entering into the question of the authority of the court to set aside the Act altogether, it is certainly a delicate power, and ought to be exercised cautiously, and in extreme and palpable cases only. We do not consider the one before us as one of that class. It is an Act confirming and quieting the title of *bonâ fide* purchasers, and sanctioning an ancient custom as to the form of acknowledgment. Such an Act ought to receive a liberal and benign interpretation, for the purpose of securing titles derived under such deeds."

3. The distinction between a mere curative statute and a retro-active Act divesting vested rights, is thus stated in *Underwood v. Lilly*:² "Confirming Acts are not uncommon; are very useful—deeds acknowledged defectively by *feme covert*s, have been confirmed, and proceedings and judgments of commissioned justices of

member of his Majesty's Council, a judge of the supreme or county court, or a master in chancery, and sometimes before a justice of the peace: And whereas there are lands and tenements held under the deeds of *femes covert*, not acknowledged in manner aforesaid, and yet made *bonâ fide* and for valuable considerations; the purchasers whereof, and those holding under them ought to be secured both in law and equity, against the respective grantors, their heirs and assigns:

"§ 1. Be it therefore enacted and declared by his excellency the Governor, the Council, and the General Assembly, and it is hereby enacted and declared by the authority of the same, That no claim to any real estate whereof any person is now actually possessed, whether as tenant in common, or otherwise, shall be deemed to be void upon the pretence that the *feme covert* granting the same had not been privately examined before any of the public officers or magistrates aforesaid." 2 Van Schaack, p. 611; 3 Rev. Stat. App. p. 22.

¹ "This day came before me, one of his Majesty's justices for the county of Essex, the within mentioned Joshua Hunloke and Ann, his wife, to acknowledge this indenture to be their acts and deed, this 19th day of February, 1711."

² *Underwood v. Lilly*, 10 S. & R. 97, 101.

the peace, who were not commissioned agreeably to the constitution, or where their power ceased on the division of counties, until a new appointment. . . . Where a law is in its nature a contract, where absolute rights are vested under it, a law retrospecting, even if it were constitutional, would not be extended by any liberal construction, nor would it be construed by any general words, to embrace cases where actions are brought. It would be confined to future actions. Statutes are *prima facie* prospective in their operation; and retrospective laws being in their nature odious, it ought never to be presumed the legislature intended to pass them where the words will admit of any other meaning. But every confirming Act is, in its very nature, retrospective. Retrospective laws which only vary the remedies, divest no right, but merely cure a defect in proceedings otherwise fair, the omission of formalities which do not diminish existing obligations, contrary to their situation when entered into, and when prosecuted; for the one is consistent with every principle of natural justice, while the other is repugnant."

4. In *Barnet v. Barnet*,¹ while the constitutionality of the Act curing defective acknowledgments, was conceded, it was nevertheless held that it did not affect a judgment rendered previous to its passage. Upon this point, the court remarked: "The second error is the opinion given by the court, that the acknowledgment of a deed from Thomas Barnet, deceased, and his wife, (the demandant), for the conveyance of the land in which dower is now claimed, was defective, so far as concerned the wife, and not sufficient to bar her of her dower. It does not appear by the certificate of this acknowledgment, that the contents of the deed were made known to the wife by the justice who took her acknowledgment, or that she did in fact know them. It has been expressly decided by this court, that this is an incurable defect; and therefore the opinion of the court below was right. Since the judgment in this case in the court of common pleas, an Act of Assembly has been passed for curing defects in the acknowledgment of deeds by married women. Had this Act been passed before the judgment below, it would have cured the defect above mentioned in the demandant's acknowledgment, and there would have been error in the court's opinion. It is our unanimous opinion that there is nothing unconstitutional in this Act of Assembly, but it is also our unanimous

¹ *Barnet v. Barnet*, 15 S. & R. 72.

opinion that it does not extend, by retrospect, to render a judgment erroneous which was entered before its passage. The question now to be decided, is, whether there was error in the judgment below at the time it was rendered, and we are of opinion there was not."

5. The subject again came up in the courts of Pennsylvania, in the case of *Tate v. Stooltzfoos*,¹ and it was there held, that the omission to state in the certificate of acknowledgment that the wife was separately examined, was cured by the Act of 1826.² "It is contended first," said the court, "that this defective acknowledgment is not cured by that Act. While I agree that the retrospective powers of this Act are to be construed strictly, and that every law of this nature is to be construed with strictness, and not to be extended by equity beyond the words of the statute, yet I can not agree to a construction that would defeat the end and object of the law, and I must confess it appears to me that in words as clear as our language affords, this provision embraces every defect, cures every invalidity in the certificate of acknowledgment, where the conveyance is a *bonâ fide* one. The purview, the preamble, and the enacting clause, conduce to prove that it was the intention of the legislature that no acknowledgment should be held invalid, defective, or insufficient in law by reason of any omission, formal or substantial, in not setting forth the particulars of an acknowledgment in the certificate. And my opinion is, that if the wife does acknowledge the conveyance to be her act and deed, before an officer authorized

¹ *Tate v. Stooltzfoos*, 16 S. & R. 35.

² The Act of April 3, 1826, declares, "That no grant, bargain, sale, feoffment, deed of conveyance, lease, release, or other assurance of any lands, tenements and hereditaments whatsoever, heretofore *bonâ fide* made and executed by husband and wife, and acknowledged by them before some judge, justice of the peace, or other officer authorized by law within this State, or an officer in one of the United States, to take such acknowledgment, or which may be so made, executed or acknowledged as aforesaid before the 1st day of September next, shall be deemed, held, or adjudged invalid, or defective, or insufficient in law, or avoided, or prejudiced, by reason of any informality or omission in setting forth the particulars of the acknowledgment made before such officer as aforesaid, in the certificate thereof; but all, and every such grant, bargain and sale, feoffment, deed of conveyance, lease, release, or other assurance, so made, executed and acknowledged as aforesaid, shall be as good, valid, and effectual in law, for transferring, passing, and conveying the estate, right, title, and interest of such husband and wife, of, in, and to, the lands, tenements, and hereditaments mentioned in the same, as if all the requisites and particulars of such acknowledgment mentioned in the Act to which this is supplementary, were particularly set forth in the certificate thereof, or appeared upon the face of the same." -Purdon's Digest, by Brightly, p. 317, § 51.

by law to take it, this acknowledgment is sufficient, though it omit all the particulars required under the former Act. It is impossible to make an enactment more expressive and comprehensive; for the naked acknowledgment is made as good, valid, and effective in law for transferring the estate, as if all the requisites and particulars of the acknowledgment recited in the former Act had been particularly set forth in the certificate thereof, or appeared upon the face of the same. It is here to be observed, that this Act only alters defective acknowledgments before the first of September, 1826.

"It is next objected, that this Act is unconstitutional. The general rule is, that all laws are in their nature prospective, yet this does not prohibit the legislature from passing some laws which have a retrospective operation. Where the laws do not impair the obligation of contracts, or are not *ex post facto*, (*ex post facto* relate to crimes, only), every confirmatory Act is in its nature retrospective." After referring to the decision in *Underwood v. Lilly*, already cited, the judge delivering the opinion, proceeded: "I have seen no reason to change that opinion. I will just add that it is an abuse of terms to contend that this is an Act divesting vested rights. Such Acts would be odious and unjust, as well as unconstitutional; for it is not intended by a vested right, that it shall be a right to do wrong; to take advantage of a mere slip in form, where the transaction is a *bonâ fide* one; and to avoid an honest conveyance fairly acknowledged, in the hands of an innocent purchaser."

6. In *Mercer v. Watson*,¹ this doctrine was carried still further. In that case, the heirs of a married woman, after her death, had recovered the possession of lands conveyed by her in conjunction with her husband in her lifetime, on the ground that as to her, the deed was defectively acknowledged. They remained in possession of the lands for seventeen years, and until the passage of the Act of 1826, above referred to. It was held, that this Act cured the defect in the acknowledgment, so as to enable those who claimed under the deed to bring an action of ejectment and recover back the premises. Upon the subject of the constitutionality of the Act, Gibson, C. J., made these observations: "The constitutionality of the Act presents a subject already exhausted. The question of its consistency with the Constitution of the State, was put at rest by

¹ *Mercer v. Watson*, 1 Watts, 330, 356.

the decision in *Tate v. Stooltzfoos*, and *Barnet v. Barnet*, already cited; nor would we have suffered it to be argued as regards the Constitution of the United States, were it not intimated that the object of raising the point here, is to submit it to the court of the last resort. For myself, I am not one of those who perceive a constitutional blemish in every statute which impinges on existing rights, and who hold the enactment of it to be in contravention of the inherent principles of a written constitution. Retrospective laws are doubtless unjust in theory, and indefensible in practice, where they are not employed as a corrective of some intolerable mischief; but where the rights they are intended to affect, are unguarded by a specific prohibition, the question of morality, as well as of policy, is for the determination of the legislature. Our inquiry, then, is a simple one: What are the specific limitations which are imposed on State legislation by the Constitution of the United States? They are all contained in the tenth section of the first article; and but the inhibition of *ex post facto* laws, and laws impairing the obligation of contracts, can be made to operate on the subject of the present controversy, even by the most strained construction. *Ex post facto* laws are necessarily retrospective; they act on existing rights, or they do not act at all. Yet the converse does not hold; for it seems to be universally conceded, since the decision in *Calder v. Bull*,¹ that retrospective laws are not necessarily *ex post facto* within the meaning of the constitution. In that case, the prohibition was held to be exclusively applicable to penal laws; such as would impart criminality to an act that was indifferent at the time, or increase the criminality of an offence already committed, or deprive a prisoner of a privilege or advantage in relation to the measure of the proof or the course of the trial. These are plainly forbidden. But in matters of civil jurisprudence, statutes simply retrospective have not been disregarded by the courts, but for disobedience of some plain, palpable, and positive mandate of the constitution. This was distinctly asserted by Mr. Justice Washington, in delivering the judgment of the court in *Satterlee v. Matthewson*,² and shown to be entirely consistent with decisions that had been thought to bear the other way. In *Calder v. Bull*, a distinction was expressly taken between *ex post facto* and retrospective laws; the prohibition of the former being protective of the

¹ *Calder v. Bull*, 3 Dall. 386.² *Satterlee v. Matthewson*, 2 Peters, 380.

person, and the security of property being referable to the clauses which forbid a tender to be made in anything but coin, or the sanctity of contracts to be violated. These clauses, it was justly remarked, would be redundant, were the prohibition of *ex post facto* laws so largely construed as to extend it to the protection of both person and property; as it would cover the whole subject. But taking that to be otherwise, the law in question carries with it no actual pretension of power to interfere with vested rights. The Act of 1770, empowered the magistrate to take the separate examination, but omitted to declare what should be evidence of the fact. The practice has been to perpetuate it by the magistrate's certificate, in analogy to the direction of the Act of 1715, and this court had thought itself bound by analogies from the case of a fine, to require the essential parts of the transaction to be specially set out, in default of which, it was held, not that the conveyance was void, but that the grantee had failed to produce the requisite proof of its execution. By interfering with the existing decisions, so far as to declare that a certificate of the fact of acknowledgment should be taken to import a compliance with all the requisitions of the law, the legislature undertook to deal, not with the contract, but the evidence of it. In what, then, had the party to be affected, a vested right? If in nothing but the quality and effect of the evidence, the right was possessed of no peculiar sanctity. An Act to change the rule which requires subscribing witnesses to be called, could not be said to affect a right, even so far as to incline a judge towards a construction favorable to an exemption from its operation of instruments in existence at the time of its enactment. It might be otherwise, were attestation by subscribing witnesses, as in the case of a will of land under the statute of frauds, an essential ingredient in the act of execution. Here, however, a specification of its ingredients was not an essential part of the acknowledgment, or of the separate examination, but a form and measure of proof enacted, not by the legislature, but by the courts; and in substituting a different one, the legislature dispensed with no part of the separate examination or acknowledgment, either in substance or in form; but in accordance with the common law maxim *omnia rite presumuntur*, declared a certificate of the naked fact of acknowledgment, to be at least *prima facie* evidence of everything necessary to constitute the whole fact. I take it, then, the supplemental Act divests no right, and that it might not be unconstitutional if it did."

7. The case was carried to the Supreme Court of the United States, where the judgment of the State court was affirmed.¹ The opinion was delivered by Story, J., who said: "Our authority to examine into the constitutionality of the Act of 1826, extends no farther than to ascertain whether it violates the Constitution of the United States; for the question whether it violates the Constitution of Pennsylvania, is, upon the present writ of error, not before us. . . . The argument for the plaintiffs in error is, first, that the Act violates the Constitution of the United States, because it devests their vested right as heirs at law of the premises in question; and secondly, that it violates the obligations of a contract; that is, of the patent granted by the proprietaries of Pennsylvania to Samuel Patterson, the ancestor of the original defendants, from whom they trace their title to the premises, by descent through Margaret Mercer. As to the first point, it is clear that this court has no right to pronounce an act of the State legislature void, as contrary to the Constitution of the United States, from the mere fact that it devests antecedent vested rights of property. The Constitution of the United States does not prohibit the States from passing retrospective laws generally; but only *ex post facto* laws. Now, it has been solemnly settled by this court, that the phrase *ex post facto* laws, is not applicable to civil laws, but to penal and criminal laws, which punish a party for acts antecedently done, which were not punishable at all, or not punishable to the extent or in the manner prescribed. In short, *ex post facto* laws relate to penal and criminal proceedings, which impose punishments or forfeitures, and not to civil proceedings, which affect private rights retrospectively. . . . In the next place, does the Act of 1826, violate the obligation of any contract? In our judgment it certainly does not, either in its terms or its principles. It does not even affect to touch any title acquired by a patent, or any other grant. It supposes the titles of the *femes covert* to be good, however acquired; and only provides that deeds of conveyance made by them shall not be void because there is a defective acknowledgment of the deeds by which they have sought to transfer their title. So far, then, as it has any legal operation, it goes to confirm, and not to impair the contract of the *femes covert*. It gives the very effect to their acts and contracts which they intended to

¹ *Watson v. Mercer*, 8 Peters, 88.

give; and which, from mistake or accident, has not been effected. This point is so fully settled by the case of *Satterlee v. Matthewson*,¹ that it is wholly unnecessary to go over the reasoning upon which it is founded."

8. In Ohio, there have been contradictory decisions concerning the legislative power to pass curative statutes, but the validity of such enactments seems now to be established. In *Good v. Zercher*,² in which the question was first presented, it was explicitly determined that the Act passed March 9, 1835,³ to render valid acknowledgments certified prior to that time which omit to state that the deed was read, or contents made known to the wife, is unconstitutional and void. "Suppose," said Read, J., "it was the intention of the legislature to take away the lands of married women or widows by curing, or rather creating, nullities into valid deeds, is it such an intention as the courts will carry into execution? The land belonged to Elizabeth Zercher, at the date of the deed. The pretended deed, as to her, is a nullity. If the Act of 1835 deprives her of the land, and gives it to Good, the lessor of the plaintiff, it may well be asked, which takes it away, the deed, or the act of the legislature? The deed did not take it away it is admitted. If it be taken away, then, it must be by the act of the legislature. But, it is replied, it is the act of the legislature acting upon the deed, and giving it validity. But the deed is a nullity—nothing. In other language, it would

¹ *Satterlee v. Matthewson*, 2 Peters, 380. For other healing statutes in Pennsylvania, see Purdon's Digest, by Brightly, p. 313, § 17; pp. 318-19, §§ 52-58; Brightly's Supp. 1323. The Act of 1840, (Purdon's Dig. by Brightly, p. 318, § 52), is not to be construed retrospectively so as to divest the title of third persons acquired before its passage. *Green v. Drinker*, 7 Watts & S. 440. Nor does it cure the defects of want of authority in the officer, or of the absence of any evidence of the wife's separate examination. 1 Phila. R. 370; Purdon's Dig. by Brightly, 318, note. But a deed from a husband to a trustee for the use of his wife, is within its operation. *Rigler v. Cloud*, 2 Harris, 361-4.

² *Good v. Zercher*, 12 Ohio, 364, Birchard, J., dissenting.

³ This Act provides, "That any deed, mortgage, or other instrument of writing, heretofore executed in pursuance of law, by husband and wife, for the purpose of conveying or incumbering the estate of the wife, or her right of dower in any lands, tenements, or hereditaments situate in this State, shall be received in evidence in any of the courts of this State, and elsewhere, as conveying or incumbering the estate or interest of the wife, or as releasing her right of dower, as the case may be, although the magistrate taking the acknowledgment of such deed, shall not have certified that he read or made known the contents of such deed, mortgage, or instrument of writing to such wife, before, or at the time she acknowledged the execution thereof." Swan's Stat., ed. 1841, p. 269; 1 Swan & Critchf. p. 470, § 17.

be the act of the legislature, acting upon nothing. And nothing, then, acted upon by legislative enactment, deprives this woman of her rights. It must be perceived, and it can not be disguised, that if this woman is thus to be deprived of her land, it is by the pure, simple, naked power of the Act itself. By what authority can the legislature take this woman's land and give it to another? It is the principal object of our political organization to secure each individual in the enjoyment of his natural rights. And the chief glory of every citizen, however humble or weak, is to feel, in the omnipotence of constitutional protection, that there is no power under God can deprive him of his property or his rights. That the government itself, under which he lives, is less than the individual man, except as it acts within the legitimate sphere prescribed by the people who made it. The right of property is coupled with the right of life, since the day that man first ate his bread in the sweat of his brow. Hence it is declared in the constitution, that the rights of acquiring, possessing and protecting property, are natural, inherent, and inalienable. And there are but three ways known to the constitution by which a man may be dispossessed of his property—by the consent of the owner; when taken for a public use, upon compensation being made in money; and by forfeiture for crime. How, then, shall this land be taken from Elizabeth Zercher, by this Act? To-day it is hers absolutely; to-morrow, without her consent, and not taken for a public use, nor forfeited for crime, her land, by the operation of this statute, is transferred to another. Such an operation of this statute is unconstitutional, and contrary to the fundamental principles of all free government, and to this extent, void.

“But it is claimed that this is a curative statute, and that such have been recognized and uniformly executed by the courts. Curative statutes may operate if confined to legitimate objects. If one competent to do the act, attempts to convey a legal estate, and should, by defect in form, transfer an equity only, the legislature might cure the defect, and convert the equitable into a legal estate; or, in better phrase, unite the two. The legislature may cure the title to property, but can not create it. But, it is asked, what is the difference between an attempted conveyance by a man and a married woman? The attempted conveyance by a man may transfer an equity. A married woman being disabled by the law, and only permitted to act as it prescribes in the sale of her lands, unless the statute be pursued, she conveys nothing, either in law or equity. It is just the same as though the legislature should pass a law

enacting that all the attempted bargains between man and man for the sale of property, heretofore made, should be valid and binding; because, in the case of the married woman, an attempt to sell is not a sale. But, it is said, the woman gets the money. The law says the husband gets it. Now, in the case of these attempted bargains, the legislature would not be curing a bargain, but creating one, which they have not the constitutional power to do. Acts which transfer no right, can never authorize the legislature, by law, to transfer property. It is said the courts of Pennsylvania, have supported laws of this character. It is our duty to keep within the light of our own constitution, and to know of no authority beyond its letter and spirit." This ruling was affirmed in *Meddock v. Williams*, and in *Silliman v. Cummins*.¹

9. But in a case that came before the Circuit Court of the United States about the time the foregoing decisions were made, a different conclusion was arrived at, and the Act of 1835, declared valid. "It is the province of a State legislature," said the court, "to regulate the conveyance of real estate. The form and effect of the conveyance it may determine; and the only objection to the above Act is, that it has a retrospective effect. It is clear that the Act of 1835, does not impair the contract, and it is not, therefore, in conflict with the Constitution of the Union. It gives effect to the intention of the parties, by relieving from a mere informality, which, under the decision of the Supreme Court of Ohio, reported in 6 Ohio Reports, was fatal to the validity of the acknowledgment. The Act, then, instead of impairing the deed, gave effect to it, as the parties intended. The Act was remedial, and in violation of no constitutional right."² And shortly afterwards, the State court overruled the previous decisions on the subject, and adopted, substantially, the doctrine of the Pennsylvania courts. In *Chesnut v. Shane*,³ where the question was first reconsidered, it was discussed by Birchard, C. J., in these terms: "By the general assent of the people of the State, and by prior adjudications, deeds had been considered valid to pass the interest of a married woman, without its appearing from the certificate of the officer, that he had made known to her their contents. The legislature evidently did not think it was required. The State courts had so held, or at least had treated the deed as good, notwithstanding the supposed defect.

¹ *Meddock v. Williams*, 12 Ohio, 377; *Silliman v. Cummins*, 13 Ohio, 116.

² *Baverty v. Fridge*, 3 McLean, 230.

³ *Chesnut v. Shane*, 16 Ohio, 599, Read, J., dissenting.

But the decision of the highest court was then, for the first time, against the validity of such deeds in one case, and one only. Was it proper to interfere? Did the peace and quiet and welfare of community require that they should interpose to settle this matter of doubtful construction, or to do that which was equivalent? The legislature thought the Act was required, and so do we. The Act, in terms, assumes that the deeds were and had been good, but yet that they contained a defect fatal to their admission to prove title before the court as then constituted, without further legislation. This is manifest from the words of the Act. . . . The deeds intended to be affected by this statute, are here treated as good and subsisting titles, such as had been executed pursuant to law. This language is certainly not such as would have been used, had it been supposed that the construction given in *Connell v. Connell*,¹ was a true interpretation of the Acts of 1818 and 1820, and the prior statutes. It is the language proper to be used, supposing our construction and the contemporaneous construction evidenced by usage, to be the correct one. Hence, it is not just to impute a design on the part of the legislature to transfer property by their own act, or to impute a disregard of the constitution to those who support the act. It was held, however, in *Good v. Zercher*, that the law was void, because, if it had any effect, its operation was to *divest* vested rights. If this were its true character, no one could sustain it. It would receive no countenance anywhere—much less from any member of this court. It purports, however, to do no such thing. Such was neither its object or effect. It confirmed, by declaring them valid, deeds which were merely doubtful. It was not a void law because it quieted in law a question which was like to be vexatious. It came in aid of vendors in perfecting their conveyances. It assured grantors that they could not be allowed to take advantage of a doubtful, technical, and merely formal matter, under a single decision of doubtful authority, to reclaim property fairly parted with for full value. It said, in substance, to the dishonest grantor, you shall hereafter act honestly. 'It gave effect,' says Judge McLean,² 'to the intention of the parties, by relieving from a mere informality.' ”³

¹ *Connell v. Connell*, 6 Ohio, 353 ; ante, ch. xiii., § 20.

² In *Raverty v. Fridge*, *supra*.

³ Approved in *Ruffner v. McLenan*, 16 Ohio, 639, 654. See, also, *Swan's Stat.*, ed. 1854, p. 314, § 27 ; 1 *Swan & Critchf.* p. 694, § 9 ; *Ibid.* p. 470, §§ 15-17 ; p. 474, § 31. The following, from the opinion of the court in *Barton v. Morris*, 15

10. In Tennessee, it is held, upon the principle that the grantor's title is inchoately divested by the execution of the deed, and that the acknowledgment or probate of the execution has no effect further to divest it, but only entitles it to registration, that statutes validating imperfect acknowledgments and probates, are not unconstitutional, though retroactive, because they do not affect rights, but only the evidence of facts.¹ It has been determined, also, that the ninth section of the Act of 1839,² curing defective probates or acknowledgments of deeds after twenty years registration, applies to conveyances executed by married women.³ But in North Carolina, an Act declaring that certain deeds not executed according to law should be deemed good and effectual for the conveyance of the lands therein mentioned, was adjudged unconstitutional as in contravention of that section of the Bill of Rights which declares the legislative, executive, and judicial powers of the government to be distinct.⁴ And in Illinois, it has been held, that the legislature can not give effect to conveyances made by married women out of the State during the two years that they were not authorized by law to execute such conveyances.⁵

Ohio, 408, is pertinent to the subject discussed in the text: "One more objection to this deed remains to be disposed of. It is said the magistrate, in taking the acknowledgment of Noah and Nathan Haines, has not affixed his seal. If this were so, the deed would be well executed under the existing state of the law. The second section of the statute (Swan's Stat. 269) declares that the deed shall be held sufficient to pass the legal title, notwithstanding the omission. The words are, 'shall be good and valid in law and equity.' The statute purports to act retrospectively—not to create title where none existed before, but to make that a good title which the parties themselves meant to make good, by dispensing with a part of the form required of the officer, and by him carelessly and negligently omitted. This statute has been repeatedly under the examination of this court upon the circuit, and has received the sanction of all its members, as a law of binding force. It violates the obligation of no contract; divests no vested right; but on the contrary, supports a contract fairly and honestly made, and such an one as a court of chancery would have enforced." See, also, *Winkler v. Higgins*, 9 Ohio St. 599; 1 *Swan & Critchf.* p. 473, § 27.

¹ *Montgomery v. Hobson*, Meigs, 437. See *Applegate v. Gracy*, 9 Dana, 215; *Pearce v. Patton*, 7 B. Mon. 162; *Blackburn v. Pennington*, 8 B. Mon. 217, 219.

² Act of 1839, c. 26, § 9.

³ *Rainey v. Gordon*, 6 Humph. 345; *Matthewson v. Spencer*, 3 Sneed, 513, Totten, J., dissenting.

⁴ *Robinson v. Barfield*, 2 Murph. 390.

⁵ *Lave v. Soulard*, 15 Ill. 123. "From 1845 to 1847, there was no statute in this State enabling married women without the State to convey their lands lying within it." Ibid. See *Moore v. Nelson*, 3 McLean, 383. A curative statute is in force in Iowa. Laws of Iowa, Rev. 1860, §§ 2249, 2250, 2253, 2256. And in the District of Columbia. Act of Congress of March 3, 1865, Laws 1864-5, p. 531.

CHAPTER XV.

OF JOINTURE AS A BAR OF DOWER.

§ 1-5. The origin of jointure and its introduction into the United States.

6. Requisites of a legal jointure.

7, 8. It must consist of an estate or interest in land.

9-12. It must take effect immediately on the death of the husband.

13-17. The estate limited must not be for a less term than the life of the wife.

18. It must be limited to the wife herself and not to another.

19, 20. But it may be limited to the husband and wife jointly in fee.

21-25. It must be made in satisfaction

of the dower, and should so appear in the deed.

26, 27. To be a complete bar it must be made before the marriage.

28. Not necessary that the estate be immediately derived from the husband.

29. The statute does not prescribe any rule as to the amount of a jointure.

30-32. Assent of the wife to the jointure.

33-66. Equitable jointure.

67-81. Jointures upon infants.

82-89. Remedy where the widow has been evicted.

90. Conveyance of the jointure.

The origin of jointure, and its introduction into the United States.

1. WE have seen that before the statute of uses, the legal title to the greater part of the real property of England, was in the hands of feoffees to uses or trustees; and that the estate of the *cestui que use* was not subject to dower.¹ One consequence arising from this separation of the legal and usufructuary interest was, that husbands provided for their wives before or after marriage, either by feoffments made to the uses of themselves and their wives, under the statute of 1 Richard III., which enabled *cestui's que use* to convey; or by limiting uses to them by deed; or by taking conveyances of the legal estate from their feoffees to themselves and their wives, either for life or in tail; and sometimes the ancestors, or collateral relatives of the husband, conveyed estates to the husband and wife, for life or in tail; and being commonly made to them "jointly," this kind of provision from thence acquired the name of a "jointure."²

¹ Vol. i., ch. xix., § 1; 2 Bl. Com. 137.

² Per Mr. Justice Wilmot, in *Drury v. Drury*, Wilmot's Opinions, 185, 186; Vernon's case, 4 Co. 1 b.

2. The statute of 11 Hen. VII., ch. 20, was made expressly to guard these provisions, and to avoid all discontinuances, alienations, and warranties made by wives, of these estates, to the prejudice of the issue or heirs of the husband. And though the word "jointure" does not occur in that statute, yet it was held, that no estate limited to a wife was within its meaning, unless it appeared to have been made for her jointure, where the inheritance was to go to the issue or heirs of the husband;¹ and these provisions went by the name of estates made "*ex provisione viri*." And from this statute of the 11 Hen. VII., and also from the recital in the clause relating to jointures in 27 Hen. VIII., it appears that these estates were frequently limited to the husband and wife and the heirs of their bodies, and sometimes to the husband and wife and the heirs of the body of the wife; and the strictest settlement which could be made at the time of passing the statute of uses, was to limit the estate to the heirs of the body of the wife, so as to bring it within the protection of the Act of the 11 Hen. VII. The limitation to trustees to preserve contingent remainders, had not then been invented; and therefore if the estate were limited to the husband for life, remainder to the first and every other son of the marriage, he might bar the contingent remainders before the existence of issue;² or if the estate were limited to the husband in tail, he might bar the estate tail, as well as the remainders, by a recovery. The most that could be done, was to vest the estate tail in the wife, and then it was under the protection of the 11 Hen. VII.; and it appears from the books that limitations of this character were very frequent, sometimes of the estate itself, but oftener of the use; and it was more natural they should be so, because it was carrying the check upon alienations then so anxiously aimed at, as far as the policy of the law would endure. And it was usual to make these limitations, not only upon the prospect of a marriage then under immediate contemplation, but estates were settled by ancestors, and taken upon purchases, with limitations to women whom they or their sons should afterwards marry, without a view to, or so much as the knowledge of, any particular woman who was to take under them.³

3. One great inconvenience attended provisions limited in the

¹ 1 Leon. 261; 1 Cro. 2.

² See vol. i., ch. xi., §§ 16-19.

³ Per Mr. Justice Wilmot, in *Drury v. Drury*, Wilmot's Opinions, 186, 187.

manner above mentioned; for whether they were made before or after the marriage, if the husband had the *legal* seizin of any other estates, either in fee or in fee tail, the wife would be entitled to dower in those estates, and to the jointure also. This resulted from the technical rules of the common law that no right can be released or conveyed until it accrues, and that title to an estate of freehold can not be barred by a collateral satisfaction.¹ As the law then stood, it was impossible to bar a woman of her dower by an assignment or assurance of lands, either before or during the marriage, though expressly mentioned to be in full satisfaction of that interest. For, as the right of dower attached at the instant of the marriage, or of the seizin during the coverture of a legal estate, this right, like all others, could only be extinguished by a release; and no release by the wife, either before or during the marriage, would be valid. If made before the marriage, it could not operate as a bar, because, at the time of making it, she had no title to dower;² if made during the coverture, it would be void by reason of the disabilities attaching to *femes covert*.³ And no estate limited to the wife during the marriage would bar her dower, for as we have seen, the common law did not permit a right or title to a freehold estate to be destroyed by the acceptance of a collateral satisfaction.⁴ This inconvenience, however, did not frequently occur, because the legal estate and the use were seldom in the same hand; and husbands had it absolutely in their power to prevent it, by putting the estates which they had before their marriage, into feoffees, and by taking all subsequent conveyances to feoffees, or to themselves and others jointly,⁵ so as to prevent the right of dower from ever attaching.⁶

¹ See ante, ch. xi., § 1; Vernon's case, 4 Co. 1 b.

² See Hastings v. Dickinson, 7 Mass. 153, 155; Gibson v. Gibson, 15 Mass. 106, 110.

³ See ante, ch. xii., §§ 2, 43.

⁴ 1 Greenl. Cruise, tit. 7, ch. 1, § 1; Vernon's case, 4 Co. 1 b.; 1 Roper, H. & W. 461. In a note to the text of Roper, Mr. Jacob says: "These observations are to be understood as applying only to the legal right to dower. 'If,' as Lord Mansfield, remarks, 'the statute of Henry VIII., had never been made, courts of equity would have given relief.' 2 Eden, 74. Though a jointure could not, independently of the statute, be pleaded at law in bar to a writ of dower, it would, it seems, be binding on the wife in equity as an agreement, if made with her concurrence, before marriage; and if made after the marriage, it would raise a case of election." 1 Roper, H. & W. 461, note. See post, §§ 33-66.

⁵ See vol. i., ch. xvi.

⁶ Drury v. Drury, Wilmet's Opinions, 187, 188.

4. It has been shown, also, that the statute of uses operated to destroy the distinction previously subsisting between the possession of the feoffee and the beneficial interest of the *cestui que use*, by instantaneously converting that interest into the legal estate; and that as a necessary result of this, the estate of the *cestui que use* became subject to dower.¹ When the legislature had determined thus to consolidate the use and legal estate, it became evident that it was necessary to make several regulations, not only in respect of the immediate influence which this consolidation would have upon real property as between persons then married, but also as to persons who should marry after the Act was made.² For, without some provision guarding against it, the unavoidable consequence would have been, to entitle the widow to dower in all her husband's unsettled estates of inheritance, and also to the lands which had been settled upon her in lieu of that right.³ To prevent this injustice, it was enacted in the same statute, that where purchases or conveyances had been or should be made, of any lands, tenements, or hereditaments, by or to, or to the use of the husband and wife in tail, or to, or to the use of one of them in tail, or for their lives, or the life of the wife, for her jointure, every woman married, having such jointure made, should not claim, nor have any title to dower to the residue of the lands, &c., which at any time were the husband's by whom she had a jointure.⁴ Upon this statute, the modern legal jointure is founded. It is defined by Lord Coke, from the purview of the Act, to be a competent livelihood of freehold to the wife, of lands and tenements, to take effect in profit or possession, presently after the death of the husband, for the life of the wife at least.⁵

5. The provisions of the 27 Hen. VIII., ch. 10, relating to jointure have been substantially adopted in most of the United States.⁶ By the Massachusetts Colony Law of 1641, the right of

¹ Vol. i., ch. xix., § 3.

² *Drury v. Drury*, Wilmot's Opinions, 188.

³ See *Vernon's case*, 4 Co. 1 b., 2 a.; Gilb. Uses, 147; 2 Bl. Com. 137.

⁴ 27 Hen. VIII., ch. 10, § 6; 1 Cruise, tit. 7, ch. 1, § 4; 2 Bl. Com. 137-8.

⁵ Co. Litt. 36 b., 37 a.; 1 Roper, H. & W. 462; 1 Washb. R. P., 2d ed., 261, pl. 5; *Vernon's case*, 4 Co. 1 a.; *McCartee v. Teller*, 2 Paige, 562; s. c. 8 Wend. 267.

⁶ 1 Rev. Stat. N. Y. pp. 741-2, §§ 9-14; 1 Md. Code, p. 683, § 289; 1 Brev. Dig. Stat. S. C. pp. 268-9, §§ 1-4; Nixon's Dig. Stat. N. J. p. 210, §§ 10-13; Va. Code, 1849, pp. 474-5, §§ 4-6; 1 Rev. St. Ind. 1852, pp. 254-5, §§ 36-42; 2 Comp. Laws Mich. p. 853, §§ 14-20; Del. Rev. Code, 1852, ch. 87, §§ 3, 4; Gen. Stat. Mass. p. 470, §§ 9-13; Rev. Stat. Maine, 1857, ch. 103, §§ 9-13; Stat. Conn. 1854, p. 383,

dower was limited to women who had not, before marriage, been "estated by way of jointure, in some houses, lands, tenements, or other hereditaments for term of life."¹ Similar language was employed in the Connecticut statute of 1672,² and in the Vermont Act of 1799.³ The Delaware statute of 1683,⁴ gives dower, "unless it appear that an equal provision be made elsewhere." By the Act of 1697,⁵ of the same State, the widow has dower "except where due and equitable provision hath been made before." The English statute was in substance re-enacted in South Carolina in 1712,⁶ in Virginia in 1785,⁷ in New York in 1787,⁸ and in Kentucky in 1796.⁹ The modifications introduced in some of the States will be noticed as we proceed.

Requisites of a legal jointure.

6. In giving a construction to the statute, courts of law, having reference to the widow's title to dower, in lieu of which jointures were substituted, have required the jointure, as to time of commencement, certainty, interest, &c., to be as beneficial to the widow as her dower. If this object be effected, it is immaterial in what manner the estate is limited to the wife; for although the statute expressly mentions these five forms of limitations only,—1st, limitations to the husband and wife, and to the heirs of the husband;

§ 21; Gen. Stat. Verm. pp. 412-13, §§ 5-11; Rev. Stat. R. I. 1857, p. 506, § 21-23; Rev. Stat. Wis. 1858, pp. 547-8, §§ 14-20; Stat. Minn. 1858, p. 409, §§ 14-20; 1 Stat. Ill. 1858, p. 152, §§ 7-11; 1 Swan & Critchf. Rev. Stat. Ohio, pp. 518-19, §§ 2-5; 2 Rev. Stat. Ky. by Stanton, p. 26, §§ 7, 8; Dig. Stat. Ark. 1858, p. 542, §§ 9-14; 1 Rev. Stat. Misso. 1855, pp. 671-2, §§ 17-19; Comp. Laws Kansas, 1862, p. 480, §§ 12-14; Stat. Oregon, 1855, p. 407, §§ 14-20.

¹ Vol. i., ch. ii., § 6. See *Hastings v. Dickinson*, 7 Mass. 153.

² Stat. Conn. Rev. 1796, p. 146; Rev. 1808, p. 239, and note; Rev. 1821, p. 180, and note. See vol. i., ch. ii., § 8.

³ Verm. State Papers, 360; ante, vol. i., ch. ii., § 22.

⁴ 1 Laws Del. App. p. 16, § 109.

⁵ Ibid. p. 24, § 4.

⁶ 2 Stat. S. C. pp. 468-9, §§ 6-9; 1 Brev. Dig. tit. 67, §§ 1-4.

⁷ 12 Hen. Stat. pp. 164-5, §§ 6-8. By an earlier law, it was provided, "That if any widow shall have such a jointure settled on her in the lifetime of her husband, as by law doth bar her of her dower, she shall not hold possession of any houses or messuages of her said deceased husband, other than what shall be so settled on her." Statutes of 1705, ch. 33, § 9; 3 Hen. Stat. 448. Re-enacted Oct. 1748, ch. 3, § 15. 5 Hen. Stat. 448.

⁸ 1 N. Y. Rev. Laws, (1813), p. 58, § 8.

⁹ 1 Stat. Ky. (ed. 1822), p. 444, §§ 6-8; 1 Stat. Law Ky. (ed. 1834), pp. 575-6, §§ 6-8.

2d, to the husband and wife, and to the heirs of their two bodies ; 3d, to the husband and wife, and to the heirs of the body of one of them ; 4th, to the husband and wife for their lives ; 5th, to the husband and wife for the life of the wife ; yet these particulars are only expressed as examples, and not in exclusion of other cases which may fall within the meaning and intention of the Act.¹ These observations will be illustrated from the consideration of what have, and what have not been determined to be valid jointures at law.

The provision must consist of an estate or interest in land.

7. Under the statute of Henry VIII., a provision for a jointure must consist either of an estate in land, or of some interest collateral to and issuing out of land ; as a rent already subsisting, or a rent created *de novo* for the purpose.² Thus, an *annuity* settled upon a wife, does not bar dower at law ;³ nor can a legal jointure be composed partly of a freehold and partly of an annuity not secured on real estate.⁴ In Virginia, before the present statute, a marriage settlement of land and slaves for the wife's jointure, "in full satisfaction of her dower or thirds in any lands and tenements whereof the husband should, at any time during his life, be seized of any estate of inheritance," was held not to bar dower in the husband's slaves, though made prior to the Act of 1792, declaring slaves personal property.⁵ In another case in the same State, it was determined, that if personal property and real estate be given to the wife in lieu of dower, and she enter upon the real estate, this is sufficient to manifest her election to take the jointure, and it is not necessary to show that she received the personal property also.⁶

8. In equity, as we shall presently see,⁷ the strict rules of law in this particular, are materially modified ; and in several of the States the distinction between legal and equitable jointure is

¹ 1 Bright, H. & W. 435, pl. 4 ; Vernon's case, 4 Co. 2 a. ; *McCartee v. Teller*, 2 Paige, 511 ; s. c. 8 Wend. 267 ; *Hastings v. Dickinson*, 7 Mass. 153 ; *Gibson v. Gibson*, 15 Mass. 106 ; *Vance v. Vance*, 8 Shepl. 364 ; *Shaw v. Boyd*, 5 S. & R. 309 ; *Sheldon v. Bliss*, 4 Seld. 31 ; *Bubier v. Roberts*, 49 Maine, 460 ; *Ball v. Ball*, 3 Munf. 279 ; *Gelzer v. Gelzer*, 1 Bail. Eq. 387 ; *Whitehead v. Middleton*, 2 How. (Missis.) 692 ; *Gould v. Womack*, 2 Ala. 83.

² 3 Prest. Abstr. 376. See *Gelzer v. Gelzer*, 1 Bail. Eq. 387.

³ *Hastings v. Dickinson*, 7 Mass. 153 ; *Gibson v. Gibson*, 15 Mass. 106.

⁴ *Vance v. Vance*, 21 Maine, 364.

⁵ *Ball v. Ball*, 3 Munf. 279.

⁶ *Ambler v. Norton*, 4 Hen. & Munf. 23. See *Lawrence v. Lawrence*, 2 Vern. 365.

⁷ Post, §§ 34-36.

abolished. This is the case in New York,¹ Massachusetts,² Maine,³ Connecticut,⁴ Missouri,⁵ Virginia,⁶ Indiana,⁷ Wisconsin,⁸ Minnesota,⁹ Oregon,¹⁰ Michigan,¹¹ Kansas,¹² Vermont,¹³ Kentucky,¹⁴ Arkansas,¹⁵ and Rhode Island.¹⁶

*It must take effect in possession or profit immediately on the death of the husband.*¹⁷

9. According to this rule, if an estate for life be limited to A. after the husband's death, and then in jointure to the wife for life; or if the limitation be to A. for a term of years after the decease of the husband, with remainder to the widow for life, in satisfaction of her dower, by way of jointure; or if the remainder for life, limited to the wife for her jointure, be expectant upon an estate tail in her husband, these will not be good jointures within the meaning of the statute, which did not intend to place widows in a worse situation, in respect of those provisions, than they would have been in regard to their dower; and the death of A., or the expiration of the term, or the husband's death without issue, will not cure the original defects.¹⁸

¹ 1 Rev. Stat. N. Y. 741, §§ 9-12; Lator, Real Estate, pp. 272-3, changing the rule established by the Act of 1787. See Sheldon v. Bliss, 4 Seld. 31; Crain v. Cavana, 36 Barb. 410; McCartee v. Teller, 2 Paige, 511.

² Rev. Stat. Mass. 1836, ch. 60, §§ 8, 9; Gen. Stat. Mass. ch. 90, §§ 9, 10; Vincent v. Spooner, 2 Cush. 467.

³ Rev. Stat. Maine, 1841, ch. 95, § 11; Rev. Stat. 1857, ch. 103, § 10; Bubier v. Roberts, 49 Maine, 460.

⁴ Stat. Conn. 1854, p. 383, § 21; Andrews v. Andrews, 8 Conn. 79; 4 Kent, 8th ed., 56, note.

⁵ 1 Rev. Stat. Misso. 1855, ch. 56, § 17.

⁶ Code Va. 1849, ch. 110, §§ 4, 5, modifying Rev. Code 1819, ch. 107, §§ 11, 12; Craig v. Walthall, 14 Gratt. 518.

⁷ 1 Rev. Stat. Ind. 1852, p. 254, § 36.

⁸ Rev. Stat. Wis. 1858, p. 547, § 16.

⁹ Stat. Minn. 1858, p. 409, § 16.

¹⁰ Stat. Oregon, 1855, p. 407, § 16.

¹¹ 2 Comp. Laws Mich. p. 853, § 16.

¹² Comp. Laws Kansas, 1862, p. 480, § 12.

¹³ Gen. Stat. Verm. p. 412, § 5.

¹⁴ 2 Rev. Stat. Ky. by Stanton, p. 26, § 7.

¹⁵ Dig. Stat. Ark. 1858, p. 452, § 11.

¹⁶ Rev. Stat. R. I. 1857, p. 506, § 21.

¹⁷ Stat. Conn. 1854, p. 383, § 21; Rev. Stat. R. I. 1857, p. 506, § 21; Del. Rev. Code, 1852, ch. 87, § 3; Stat. Oregon, 1855, p. 407, § 14; Nixon's Dig. Stat. N. J. p. 210, § 10; 2 Comp. Laws Mich. p. 853, § 14; Rev. Stat. Wis. 1858, p. 547, § 14; Stat. Minn. 1858, p. 409, § 14; Rev. Stat. Maine, 1857, ch. 103, § 9; 1 Rev. Stat. Ohio, p. 518, § 2; Gen. Stat. Mass. p. 470, § 9; Comp. Laws Kansas, 1862, p. 480, § 12; 1 Rev. Stat. Misso. 1855, p. 671, § 17; Gen. Stat. Verm. p. 412, § 5; 1 Rev. Stat. Ind. p. 254, § 38.

¹⁸ 1 Roper, H. & W. 464; Co. Litt. 36 b.; Vernon's case, 4 Co. 2 a.; Hob. 151;

10. The mere *possibility* of the jointure taking effect upon the husband's death, is insufficient; it must be so limited as to insure that result. If, therefore, the limitation were to A. for life, remainder to B. for life, with remainder to such woman as B. might marry, this would not be a good jointure upon the wife of B., because it is subject to the contingency of A. dying before B., which event not happening, the widow of B. would be unprovided for from the death of her husband so long as A. lived.¹

11. It is obvious that if jointures of the character above stated had been established under the statute, widows might have been deprived of their dower without deriving any benefit from the provision substituted in its place, which would have been contrary to the intention of the statute. But a *mesne* estate intervening between the estate for life of the husband and the remainder to the widow for her life as a jointure will not prejudice the settlement, if such mesne estate be concurrent with the husband's, and can not exceed it, and in that event, the interest limited to the widow will be a good jointure within the intent and meaning of the statute. Thus, if the limitation were to the husband for life, remainder to the use of trustees during the husband's life, to preserve contingent uses, with remainder to the wife for life in jointure, such a provision would be a valid jointure.²

12. The rule under consideration is to be understood as applying to the *mode* in which the jointure is to be limited. It seems that a jointure will not be rendered void by an uncertainty as to its taking effect in possession, arising from the title to the property settled being defective.³

*The estate limited must not be for a less term than the life of the wife.*⁴

13. Accordingly, an estate settled upon the wife *pur autre vie*,

Wood v. Shurley, Cro. Jac. 489; Hut. 51; Winch, 33; Gilb. Uses, 148; McCartee v. Teller, 2 Paige, 511; Hastings v. Dickinson, 7 Mass. 153; Gibson v. Gibson, 15 Mass. 106; Vance v. Vance, 8 Shepl. 364; Gelzer v. Gelzer, 1 Bail. Eq. 387; Crain v. Cavana, 36 Barb. 410.

¹ 1 Sid. 3, 4; Winch, 33; Caruthers v. Caruthers, 4 Bro. C. C. 500, 513. See post, § 12.

² 1 Roper, H. & W. 465; 1 Bright, H. & W. 436-7.

³ Corbet v. Corbet, 1 Sim. & Stu. 612; 5 Russ. 254; Jacob's note, 1 Roper, H. & W. 464.

⁴ Gen. Stat. Mass. p. 470, § 9; Rev. Stat. Maine, 1857, ch. 103, § 9; Rev. Stat.

or during the lives of three or more persons,¹ is not a good jointure within the statute; because she may survive all of them, in which event she would be unprovided for; so that this is a case not within the contemplation of the Act.

14. Mr. Roper states it as the rule fairly deducible from Vernon's case,² that if the continuance of the widow's estate be made to depend upon herself, viz.: her remaining single, or her performance or non-performance of certain conditions, such a qualified or conditional freehold will be a good legal jointure, and bar her of her dower, whether she determine her estate or not; for the jointure, in its creation, being a freehold, and which might continue for her life, is within the letter and the intention of the statute; and the circumstance of its being made defeasible at the election of the widow, does not take the case out of the Act.³

15. In commenting upon the case cited by Mr. Roper, in support of this position, Mr. Jacob says:⁴ "It is doubtful whether it was intended to be decided that an estate thus qualified would universally constitute a good legal jointure. The case related to a jointure made after marriage, and the chief reason given for the decision was, that the widow had accepted it, and that if the condition had been unreasonable, she might have waived it; and it does not seem to have been thought that a jointure subject to a condition would be good unless accepted.⁵ This reasoning does not apply to antenuptial jointures, which are not waivable, and do not derive their effect from the acceptance of the widow. The ninth section of the statute, which applies to jointures made after marriage,⁶ may admit of a larger construction than the sixth, with reference to the nature of the estate to be limited to the wife; it speaks of lands assured to the wife 'for the term of her life, or otherwise, in jointure.' One

Wis. 1858, p. 547, § 14; Stat. Minn. 1858, p. 409, § 14; 1 Brev. Stat. S. C. p. 268, § 1; 1 Rev. Stat. Ohio, p. 518, § 2; Nixon's Dig. Stat. N. J. p. 210, § 10; 2 Comp. Laws Mich. p. 853, § 14; Del. Rev. Code 1852, ch. 87, § 3; Stat. Oregon, 1855, p. 407, § 14; Stat. Conn. 1854, p. 383, § 21; Rev. Stat. R. I. 1857, p. 506, § 21; Comp. Laws Kansas, 1862, p. 480, § 12; 1 Rev. Stat. Misso. 1855, p. 671, § 17. In Indiana, the jointure, if consisting of lands, must not be less than a freehold estate. 1 Rev. Stat. Ind. 1852, p. 254, § 38. The statutes of several of the States are silent upon this point. This is the case in Virginia, Kentucky, Arkansas, Illinois, New York, Maryland, and Vermont.

¹ Vernon's case, 4 Co. 2 b.; Co. Litt. 36 b.

² Vernon's case, *supra*.

³ 1 Roper, H. & W. 467.

⁴ Ibid. 467, note.

⁵ See Cro. Eliz. 452; Gilb. Uses, 148.

⁶ See post, § 26.

of the reasons for the decision in Vernon's case was, that the jointure in question came within these words."¹

16. In *McCartee v. Teller*,² Walworth, Chancellor, expressed substantially the same views;³ but in the court of errors, Mr. Justice Nelson insisted in an elaborate opinion, that an estate during widowhood settled upon the wife before marriage, comes within the statute concerning jointures, and is a legal bar of dower whether afterwards accepted by her or not.⁴

17. If the estate settled in jointure be of a nature less than freehold, as of a term for years, then, although the term from its length must necessarily exceed the life of the widow, it will not be a legal jointure within the provisions of the statute, because it is but a chattel interest, and less in the eye of the law than a freehold for the wife's life.⁵

The estate must be limited to the wife herself and not to another in trust for her.

18. The statute of Henry VIII., as we have noticed,⁶ had in contemplation such jointures only, as were limited to the wife's use; so that where the use, instead of being limited to the wife, is limited to a stranger in trust for her, the jointure is not a *legal* jointure, either within the letter or spirit of the Act. And although the jointure be expressed to be in satisfaction of dower, and the widow accept it, yet neither of these circumstances will give it validity at law.⁷ A trust estate, however, is good as an *equitable* jointure.⁸

But it may be limited to the husband and wife jointly in fee.

19. If the estate be limited to the husband and wife in fee simple,

¹ Dyer, 317 b.; 4 Co. 3 a.

² *McCartee v. Teller*, 2 Paige, 511, 560. See, also, Clancy, Rights of Women, 209; *Caruthers v. Caruthers*, 4 Bro. C. C. 500; 1 Washb. R. P., 2d ed., p. 262, pl. 6.

³ To the same effect, 4 Kent, 55, 56.

⁴ *McCartee v. Teller*, 8 Wend. 267. Upon the subject of devises during widowhood in lieu of dower, see post, ch. xvi.

⁵ Co. Litt. 36 b.; *Gelzer v. Gelzer*, 1 Bail. Eq. 387.

⁶ Ante, § 4.

⁷ Co. Litt. 36 b.; *Hervey v. Hervey*, 1 Atk. 561; 1 Roper, H. & W. 474.

⁸ Post, § 33 *et seq.* In several of the United States, a jointure by conveyance to another in trust for the wife, is made good by statute. 1 Rev. Stat. N. Y. 741, § 9; 1 Rev. Stat. Ind. 1852, p. 254, § 36; 1 Stat. Ill. 1858, p. 152, § 7; Dig. Stat. Ark. 1858, p. 452, § 9.

it will be a good jointure, although the limitation be not one of those mentioned in the statute;¹ because such a provision is within its intention; for if she be the survivor, then she will have a larger interest than if the estate had been merely limited to her for life after her husband's death; and if she die before him, there is no occasion for the provision.

20. Upon this subject, Mr. Roper, remarks:² "It has, indeed, been said, that if the limitation were to the husband for life, remainder to his wife and A. for their lives, that would not be a good jointure,³ because the settlement, not being to the wife alone, it is not a case mentioned in the statute.⁴ But such a decision does not appear satisfactory, since the widow has a freehold interest for her life to commence in certainty in possession and profit, immediately upon her husband's death, with a contingency in the event of her surviving A. of becoming beneficially possessed of the whole estate; so that this provision may be greatly to the widow's advantage. And with respect to the case not being mentioned in the statute, it has been before observed, that the Act extends to cases not enumerated in it. For these reasons, it is presumed that such a provision would be a good jointure, notwithstanding the decision in Winch, referred to in support of the contrary opinion, for that case appears to have been decided upon the principle, that the jointure might not have commenced at the husband's death, since his father, the settlor, who reserved to himself an estate for life, might have survived his son."

It must be made in satisfaction of the dower, and should so appear in the deed.

21. It was held in Vernon's case,⁵ and in Tracy v. Ivies,⁶ that if the provision made for the wife by her husband was not expressed in the deed to be a jointure or in satisfaction of her dower, that circumstance might be shown by an averment supported by parol evidence; and the same doctrine was entertained in an anonymous case in Owen,⁷ in Villers v. Beamont,⁸ and in other authorities. But Mr. Roper considers that these cases, so far as they relate to

¹ Dennis's case, Dyer, 248 a.; Vernon's case, 4 Co. 3 b.

² 1 Roper, H. & W. 466; 3 Prest. Abstr. 376.

³ Winch, 33.

⁴ 3 Bac. Ab. "Jointure," (B), 713.

⁵ Vernon's case, 4 Co. 1.

⁶ Tracy v. Ivies, 1 Leon. 311.

⁷ Owen, 33.

⁸ Villers v. Beamont, Dyer, 146 a., pl. 68.

this matter, are superseded by the statute of frauds,¹ which declares that no estates or interests of freehold, &c., shall be surrendered, &c., unless by deed or note in writing, &c. "If then," he observes, "oral testimony were admissible to add to the instrument by such evidence what is not expressed in it, viz.: that the provision for the wife was intended as a jointure, the effect would be to allow the surrender of her freehold title to dower by parol, when the statute requires such surrender to be made in writing."² Upon this point he cites as authority the case of *Tinney v. Tinney*,³ which occurred subsequently to the statute of frauds. In that case a bill was brought for dower against the heir, who insisted that the husband had given a bond in trust to secure to his wife, the plaintiff, 400*l.* in case she survived him; the heir also alleged that this provision was, at the time it was made, intended to be in lieu of dower, and that the wife acknowledged it to be so, which he offered to prove. But Lord Hardwicke was of opinion that this parol evidence could not be received, since it was within the statute of frauds and perjuries; and he said that a general provision for a wife was not a bar of dower unless it was expressed to be so.⁴ Mr. Cruise, however, appears to be of opinion, that an averment may in this case be made since the statute.⁵

22. It is sufficient, however, if the intention that a provision for the wife shall be in bar of dower, appear by necessary implication from the contents of the instrument,⁶ or if it can be fairly collected from the circumstances.⁷

23. It is further requisite that the deed should not leave it a matter of doubt as to the part or proportion of the dower to which the jointure was intended to apply, when it was not meant to be in satisfaction of the whole. If, therefore, the settlement mention the

¹ 29 Car. II., ch. 3.

² 1 Roper, H. & W. 471.

³ *Tinney v. Tinney*, 3 Atk. 8.

⁴ *S. P. Charles v. Andrews*, 9 Mod. 152. And see the remarks of Lord Chancellor King in *Vizard v. Longdale*, Kelynge's Ch. Cas. 17, cited in 13 Eng. Law & Eq. 408, note; 2 Bl. Com. 131, note.

⁵ 1 Greenl. Cruise, *191, §§ 17-20. See, also, 4 Co. 3 a., note (A 1); *Finch v. Finch*, 10 Ohio St. 501.

⁶ Jacob's note, 1 Roper, H. & W. 471. See *Caruthers v. Caruthers*, 4 Bro. C. C. 500; *Garthshore v. Chalie*, 10 Ves. Jr. 1, 20; *Worsley v. Worsley*, 16 B. Mon. 469; *Tevis v. McCreary*, 3 Met. (Ky.) R. 151.

⁷ *Walker v. Walker*, 1 Ves. Sen. 54; *Belt's Supp.* 43, and cases there cited. See 2 Eden, 60; 2 Bl. Com. 138, note; 1 Greenl. Cruise, *192, note.

provision to be made in lieu of part of the dower only, this will not be a jointure within the statute, because it is impossible to ascertain what part or proportion of the dower the jointure was intended to satisfy.¹ Upon this subject, we find the following case proposed in the fourth report:² If lands be conveyed to a woman before marriage for part of her jointure, and more land is conveyed to her after marriage for her full jointure, and in satisfaction of her whole dower, and then the husband die; if the widow waive the land conveyed to her use after her marriage, she shall have the lands which were conveyed to her before the marriage in part of her jointure, and also her dower in the residue of the estate; because the conveyance in part of jointure was no bar to dower, from the uncertainty of the expression, and the impracticability of its application.³

24. But it is presumed that the husband may, previously to the marriage, purchase by a jointure, his wife's dower in particular parts of his estate, if the lands are clearly ascertained in the deed; for the statute does not forbid this, but on the contrary, virtually includes it, by giving the power to prevent by a jointure the wife's right to dower in the whole of his lands; and the general maxim applies to the case, viz.: *Omne majus in se continet minus*.⁴

25. In New York,⁵ in Missouri,⁶ and in Kentucky,⁷ it has been held, in accordance with the rule laid down by Mr. Roper,⁸ that a jointure to the wife, unless it appear to be in satisfaction of dower, will not bar that right. Substantially the same ruling has been made in Maine, the court declaring it to be "quite certain that nothing less than a direct and explicit declaration, or its equivalent, at the time of the execution and delivery, made to the wife, that the deed was intended to be in lieu of dower, or that it was delivered on condition that, if received and retained, it should be a bar of her dower, could have that effect."⁹ In an early Virginia case,¹⁰ the court, in giving a construction to the Act of 1794,¹¹ decided that

¹ Co. Litt. 36 b.; Vernon's case, 4 Co. 3 a.

² Vernon's case, 4 Co. 3 a.

³ 1 Roper, H. & W. 473.

⁴ 1 Roper, H. & W. 473.

⁵ Swaine v. Perine, 5 John. Ch. 482.

⁶ Perry v. Perryman, 19 Misso. 469.

⁷ Worsley v. Worsley, 16 B. Mon. 455, 469; Yancy v. Smith, 2 Met. (Ky.) 408.

⁸ Ante, § 21.

⁹ Bubier v. Roberts, 49 Maine, 460. See, also, Green v. Porter, 7 Porter (Ala.), 19; Liles v. Fleming, 1 Dev. Eq. 185.

¹⁰ Ambler v. Norton, 4 Hen. & M. 23.

¹¹ Stat. 1794, ch. 94, § 11; 1 Rev. Code, p. 171, § 11. This Act provided, "That

any estate conveyed as a jointure, in lieu of dower, though not so expressed, may be averred to have been so intended, and that parol or other evidence, outside of the deed, is admissible to show the relative situation of the parties, and the circumstances of the testator, from which such intention may be inferred. By statutes in force in Connecticut,¹ Vermont,² Missouri,³ and Kansas,⁴ it is required that the jointure shall be expressed to be in lieu of dower.

A jointure to be a complete bar must be made before the marriage.

26. The statute of Henry VIII., contains a proviso reserving to the widow a right of election between the jointure and her dower, when the provision is made after the marriage.⁵ Still, if made after the marriage, it will be a jointure within the statute if it conform thereto;⁶ but it is voidable by the widow after her husband's death, at her election.⁷ If, therefore, she enter upon the lands so settled, and receive the rents, that will be a confirmation of the jointure, and a bar of dower.⁸ And if she, by a writ of dower, waive her jointure, she will, at law, be confined to her dower, and not be permitted to claim both dower and jointure.⁹

27. The foregoing provision of the English statute has been generally adopted in the United States, and where the settlement was made during the coverture, the wife is entitled to elect between the jointure and her dower.¹⁰ In a number of the States it is pro-

if any estate be conveyed by deed or will, either expressly or by *averment*, for the jointure of the wife in lieu of dower, to take effect and continue as in the Act is expressed, such conveyance shall bar her dower," &c. The present statute does not contain the clause upon which the court proceeded in the case cited. Code Va. 1849, p. 474, § 4.

¹ Stat. Conn. 1854, p. 383, § 21.

² Gen. Stat. Verm. p. 412, § 5.

³ 1 Rev. Stat. Misso. 1855, p. 671, § 17.

⁴ Comp. Stat. Kansas, 1862, p. 480, § 12.

⁵ 27 Hen. VIII., ch. 10, § 9; Co. Litt. 36 b.

⁶ Vernon's case, 4 Co. 4 a.

⁷ Co. Litt. 36 b.

⁸ 3 Co. 26 a., 26 b.; 3 Leon. 271; Dyer, 220 a.; Vernon's case, 4 Co. 4 a.; Ambler v. Norton, 4 Hen. & M. 23. See Evans v. Evans, 3 Yeates, 507.

⁹ Sharp v. Purslow, cited 4 Co. 4 b., and 5 a.; Gosling v. Warburton, Cro. Eliz. 128; Tracy v. Ivies, 1 Leon. 311; McCartee v. Teller, 2 Paige, 556; s. c. 8 Wend. 267; Hastings v. Dickinson, 7 Mass. 153; 1 Roper, H. & W. 469.

¹⁰ Gen. Stat. Mass. p. 470, § 11; Rev. Stat. Maine, 1857, ch. 103, § 11; Rev. Stat. Wis. 1858, p. 547, § 17; Stat. Minn. 1858, p. 409, § 17; 1 Stat. Ill. 1858, p. 152, § 9; 1 Rev. Stat. Ohio, p. 518, § 2; 1 Rev. Stat. N. Y. p. 741, § 12; 1 Rev. Stat. Ind. p. 254, § 40; 1 Brev. Dig. Stat. S. C. p. 269, § 4; 2 Rev. Stat. Ky. by Stanton, p. 26,

vided that she shall be deemed to have elected to take the jointure, unless, within a specified time after the death of her husband, or the grant of letters upon his estate, she shall enter on the lands to be assigned for her dower, or institute proceedings for the recovery thereof.¹ In Massachusetts,² Maine,³ Kentucky,⁴ and Vermont,⁵ the widow is barred of her dower, unless she waive her jointure within the time limited. And in all these States except Massachusetts, her election must be made in writing. The law is the same in Rhode Island,⁶ and in Illinois.⁷

*Not necessary that the estate limited be immediately derived from the husband.*⁸

28. The letter of the statute of Henry VIII., is confined to jointures made by the husband; but as already stated, its provisions have been liberally construed; and a jointure settled upon the wife by the father of the husband, or through the medium of trustees, is considered within the meaning of the Act.⁹

The statute does not prescribe any rule as to the amount of a jointure.

29. According to a literal construction of the Act, the right to dower is barred, however inadequate the settlement may be. Hence Lord Northington, says: "The estate which is to bar dower is of no defined value by the statute, and if it be made up of the qualities and accidents specified, it is a legal bar, and every court of law is

§ 7; Dig. Stat. Ark. 1858, p. 452, § 11; Del. Rev. Code 1852, ch. 87, § 3; Stat. Oregon, 1855, p. 407, § 14; Stat. Conn. 1854, p. 383, § 21; Rev. Stat. R. I. 1857, p. 506, § 21; Gen. Stat. Verm. p. 412, § 5; Nixon's Dig. Stat. N. J. p. 210, § 12; 2 Comp. Laws Mich. p. 853, § 17; Code Va. 1849, p. 474, § 5; Comp. Laws Kansas, 1862, p. 480, § 13; 1 Rev. Code Misso. 1855, p. 672, § 18.

¹ 1 Rev. Stat. N. Y. p. 742, § 14; 1 Rev. Stat. Ind. 1852, p. 254, § 40; 1 Stat. Ill. 1858, p. 152, § 11; Rev. Stat. Wis. 1858, p. 548, § 19; Stat. Minn. 1858, p. 409, § 19; 2 Comp. Laws Mich. p. 853, § 19; Rev. Stat. R. I. 1857, p. 506, § 21; Stat. Oregon, 1855, p. 407, § 19; Dig. Stat. Ark. 1858, p. 452, § 14.

² Gen. Stat. Mass. p. 470, § 11.

³ Rev. Stat. Maine, 1857, p. 606, § 11.

⁴ 2 Rev. Stat. Ky. by Stanton, p. 26, § 7.

⁵ Gen. Stat. Verm. p. 412, § 6.

⁶ Rev. Stat. R. I. 1857, p. 506, § 21.

⁷ 1 Stat. Ill. 1858, p. 152, § 11.

⁸ Stat. Conn. 1854, p. 383, § 21; Gen. Stat. Verm. p. 412, § 5; Comp. Laws Kansas, 1862, p. 480, § 12; 1 Rev. Stat. Misso. 1855, p. 671, § 17.

⁹ 1 Roper, H. & W. 475; Anon. Moor, p. 28, pl. 91; *Ibid.* p. 93, pl. 231; Ashton's case, Dyer, 228 a., pl. 46; 3 Prest. Abstr. 376.

bound to accept it as such.”¹ Lord Coke, though he describes a jointure as a competent livelihood,² &c., does not mention adequacy of amount in his enumeration of the points to be observed in making a perfect jointure within the statute, and does not allude to any criterion by which its competency is to be ascertained. It seems to be clear, that if the settlement be made before marriage with the consent of the wife, or if, being made during the coverture, it is afterwards accepted by her, it can not be objected to on the ground of inadequacy. The amount of the jointure will not, therefore, be material to its legal effect, except in cases where the wife was an infant at the time of the marriage,³ or where the jointure was made before marriage without her assent.⁴ Nor is it essential to the validity of a jointure, that it should be exempt from incumbrance,⁵ as the widow, if evicted, has a right to claim her dower.⁶

Assent of the wife to the jointure.

30. We have seen that a jointure settled after the marriage may be avoided at the election of the wife;⁷ but under the statute of Henry VIII., a jointure made before the marriage is binding on the wife without her assent.⁸ In commenting upon the case of *Drury v. Drury*,⁹ in which the principal question was whether an infant may be barred of dower by a jointure settled before marriage, Mr. Jacob says:¹⁰ “The argument on this point ultimately depended, in a great measure, upon the question whether the agreement of the wife to a legal jointure made before marriage, was necessary to make it binding upon her under the statute. It is not required that the wife should concur in the settlement by which the jointure is made, and it is not in terms required that she should assent to it. But from the provisions of the statute as to settlements made after marriage, it is clear that it was not intended to enable the husband by his own act to impose on the wife in lieu

¹ 2 Eden, 57.

² Co. Litt. 36 b., 37 a.

³ See post, §§ 72, 78, 79.

⁴ Jacob's note, 1 Roper, H. & W. 462. See *Levering v. Heighe*, 2 Md. Ch. Dec. 81; *Gould v. Womack*, 2 Ala. 83; *McCartee v. Teller*, 2 Paige, 511; post, § 55.

⁵ *Ambler v. Norton*, 4 Hen. & Munf. 23.

⁶ Post, §§ 75-89.

⁷ Ante, § 26.

⁸ 4 Bro. C. C. 506, note; 2 Eden, 60; 1 Greenl. Cruise, *199, § 37; 1 Washb. R. P., 2d ed., p. 263, pl. 9.

⁹ *Drury v. Drury*, Wilmot's Opinions, 177; s. c. 3 Bro. Parl. Cas. 492.

¹⁰ Jacob's note, 1 Roper, H. & W. 477.

of her dower, any jointure which he might think fit. The legislature seems to have assumed, that all antenuptial jointures must be settled by agreement of the parties, and there seems some reason for contending, that without such agreement the jointure would not, in strictness, be within the Act, as by the common law the estate conveyed to the wife by way of jointure would not be effectually vested in her without an actual or presumed acceptance on her part. If it was made with her privity, her marrying with notice of it; would of course be an acceptance of the settlement and conclusive evidence of her agreeing to it.¹ But if it was made without her privity she had the power of disagreeing to the estate conveyed to her, as soon as she became *sui juris*, and was apprized of the fact. Her disagreement would render the conveyance void, and it would seem that a jointure thus prevented from taking effect, would not bar her right of dower under the statute. It was, however, determined that a legal jointure was to be considered, not as a compensation for dower agreed for by the wife, but merely as a provision conferred upon her, and that it was not founded on any idea of contract; and hence it followed that in the case of the wife being an infant, no objection arose from her incapacity to contract.² Mr. Justice Wilmot, in his judgment, entered fully into the discussion of this question. He observed, that the bar to the right of dower did not arise from the agreement of the woman to a jointure made before marriage, but from the energy and force of the Act of Parliament substantiating the settlement against her for this particular purpose.³ He thought that the meaning of the legislature with respect to women then married, was that those who had settlements made before their marriages should acquiesce under those settlements, and abide by the provisions thereby made for them, whether they were great or small, adequate or inadequate, whether they had been made by the agreement of themselves or their friends, or had been the mere spontaneous act of the husband or his ancestors.⁴ The objection that the husband might, before marriage, settle an inadequate jointure on the wife without her assent or knowledge, for the purpose of depriving her of dower, did not, as he observed, apply to cases of jointures made before the statute, as a fraud of that description could not then have been contemplated. But in cases subsequent to the statute, he thought that such join-

¹ *Estcourt v. Estcourt*, 1 Cox, 20.

² See 2 Eden, 62, 72.

³ *Wilmot's Opinions*, 194.

⁴ *Ibid.* 202.

tures would be void on the ground of fraud, that the fraud might be pleaded at law, and that the fairness and competency would be a question to be decided by a jury, taking into consideration all the circumstances of the transaction. 'A pocket jointure,' he added, 'made upon a woman without her privity, or upon an infant with her privity, but without the interposition of parents or guardians, would be such an evidence of fraud as would be sufficient to condemn it.' In another case Lord Hardwicke suggested that equity might relieve against a jointure merely illusory."¹

31. In some of the American States, the English rule is changed by statute. Thus, in New York,² Massachusetts,³ Maine,⁴ Connecticut,⁵ Delaware,⁶ Indiana,⁷ Illinois,⁸ Arkansas,⁹ Kentucky,¹⁰ Wisconsin,¹¹ Minnesota,¹² Michigan,¹³ and Oregon,¹⁴ the assent of the wife is essential to the validity of a jointure; the usual requirement being, that such assent shall be evinced, if she be of full age, by her becoming a party to the conveyance by which it is settled; or if she be an infant, by her joining with her father or guardian in its execution. If, however, a jointure is settled before marriage without the assent of the wife, she is required to elect between the jointure and her dower; she can not take both.¹⁵

32. If the articles making provision for the wife, omit any of the essential requisites of a legal jointure, she will not be barred of her dower at law, even though she has joined therein before marriage, and expressly covenanted not to claim dower.¹⁶ Such covenant

¹ 3 Atk. 612. See, also, *Daly v. Lynch*, 3 Bro. P. C. 478, ed. Toml. In England the provisions of the statute of Hen. VIII, relating to jointure, are superseded by the 3 & 4 Will. IV., ch. 105, by which the right of dower is placed within the absolute control of the husband. See App. vol. i.

² 1 Rev. Stat. N. Y. p. 741, §§ 9-11.

³ Gen. Stat. Mass. ch. 90, §§ 9, 10.

⁴ Rev. Stat. Maine, 1857, ch. 103, §§ 10, 11; *Vance v. Vance*, 21 Maine, 364.

⁵ Stat. Conn. 1854, p. 383, § 21. See *Andrews v. Andrews*, 8 Conn. 79.

⁶ Del. Rev. Code, 1852, ch. 87, § 3.

⁷ 1 Rev. Stat. Ind. 1852, p. 254, § 36.

⁸ 1 Stat. Ill. 1858, p. 152, §§ 7, 8.

⁹ Dig. Stat. Ark. 1858, p. 452, §§ 9-11.

¹⁰ Rev. Stat. Ky. 1852, p. 393, § 7.

¹¹ 1 Rev. Stat. Wis. 1858, p. 547, § 14.

¹² Stat. Minn. 1858, p. 409, § 14.

¹³ 2 Comp. Laws Mich. p. 853, § 14.

¹⁴ Stat. Oregon, 1855, p. 407, § 14. See, also, 1 Rev. Stat. Misso. 1855, p. 671, § 17, and compare with § 18; Comp. Laws Kansas, 1862, p. 480, §§ 12, 13.

¹⁵ The rule in regard to the election in such cases is the same as where the jointure is made during coverture. See ante, § 27.

¹⁶ *Hastings v. Dickinson*, 7 Mass. 153; *Gibson v. Gibson*, 15 Mass. 106; *Vance v. Vance*, 8 Shepl. 364; *Blackmon v. Blackmon*, 16 Ala. 633. See *Gelzer v. Gelzer*, 1 Bail. Eq. 387. As to the rule in equity, see post, §§ 33-66.

can not operate by way of release, estoppel, or rebutter.¹ It is suggested, however, in one case, that if such an antenuptial covenant be entered into, founded on a valuable consideration, and the widow, notwithstanding, sue for, and recover her dower, she will be liable upon her covenant in a sum in damages equal to the value of her dower.²

Equitable jointure.

33. It may be convenient, in treating upon this subject, to revert to the requisites of a good legal jointure, and then to show in what particulars equity differs or varies from the law in these respects; the reader not forgetting that the authority of courts of law for admitting collateral provisions in bar to the right of dower, is founded upon a special statute, and that the jurisdiction of courts of equity, in these matters, existed before that Act, upon the principle of enforcing agreements entered into between individuals.³

34. The first requisite which, as before noticed, is necessary to a binding legal jointure, is, that it be made to commence in possession or profit immediately from the husband's death.⁴ With this agrees the rule in equity,⁵ except the intended wife be a party to the deed, and by executing it, consent to accept a more uncertain and disadvantageous provision in lieu of dower, for then she will be bound and absolutely barred of her common law right. Accordingly, Lord Alvanley, advertng to this subject in *Caruthers v. Caruthers*,⁶ said, "that if the wife had been adult she might have taken a chance in satisfaction for her dower, acting with her eyes open."⁷

35. With respect to the legal requisite, that the estate limited in jointure be such an estate of freehold as should continue during the wife's life,⁸ no such circumstance will be necessary in equity

¹ *Hastings v. Dickinson*, 7 Mass. 153; *Gibson v. Gibson*, 15 Mass. 106; *Vance v. Vance*, 8 Shepl. 364; *Blackmon v. Blackmon*, 16 Ala. 633. See *Gelzer v. Gelzer*, 1 Bail. Eq. 387. As to the rule in equity, see post, §§ 33-66.

² *Gibson v. Gibson*, 15 Mass. 106. See, also, *Hastings v. Dickinson*, 7 Mass. 153, 155.

³ 1 Roper, H. & W. 487.

⁴ Ante, §§ 9-12.

⁵ *McCartee v. Teller*, 2 Paige, 511; s. c. 8 Wend. 267; *Crain v. Cavana*, 36 Barb. 410. See *Levering v. Heighe*, 2 Md. Ch. Dec. 81.

⁶ *Caruthers v. Caruthers*, 4 Bro. C. C. 513.

⁷ To the same effect is the late case of *Dyke v. Rendall*, 13 Eng. L. & Eq. 404, 411; s. c. 2 De G. M. & G. 209.

⁸ Ante, §§ 13-17.

in order to make the jointure an absolute bar to dower, if the intended wife be of age and a party to the deed; because, as she is able to settle and dispose of all her rights, she is competent to extinguish her title to dower upon any terms to which she may think proper to agree. If, therefore, she accept of a term for years,¹ or an annuity,² or copyhold lands,³ in lieu of her dower, she will be concluded, and barred of her common law right.⁴

36. By statute in New York,⁵ any pecuniary provision made for the benefit of the intended wife in lieu of dower, will, if assented to by her as required by the Act, operate as a bar. Similar enactments have been adopted in Massachusetts,⁶ Maine,⁷ Indiana,⁸ Connecticut,⁹ Virginia,¹⁰ Kentucky,¹¹ Rhode Island,¹² Missouri,¹³ Wisconsin,¹⁴ Minnesota,¹⁵ Oregon,¹⁶ Michigan,¹⁷ Kansas,¹⁸ Vermont,¹⁹ and Arkansas.²⁰ If a provision of this character be made after the marriage, or before the marriage without the assent of the wife, she is required to elect whether she will receive it or take her dower.²¹ Chancellor Kent has remarked, that in Pennsylvania, it is left a doubtful question whether the settlement of personal estate would be held equivalent to a jointure, and sufficient to bar dower;²² but in several of the decided cases it appears to be assumed that the rule of the English equity courts is in force in that State.²³

¹ *Rose v. Reynolds*, 1 Swan. 446; *Charles v. Andrews*, 9 Mod. 152.

² *Vizard v. Longdale*, Kelynge's Ch. Cas. 17, *sub nomine* *Vizod v. Londen*; cited 2 Eden, 66; 13 Eng. Law & Eq. 408, note.

³ *Lacy v. Anderson*, 1 Swan. 445; *Gladstone v. Ripley*, cited 2 Eden, 59.

⁴ 1 Roper, H. & W. 487-8.

⁵ 1 Rev. Stat. N. Y. 741, § 11. See *Barante v. Gott*, 6 Barb. 492; *Tisdale v. Jones*, 38 Barb. 523.

⁶ Gen. Stat. Mass. ch. 90, § 10.

⁷ Rev. Stat. Maine, 1857, ch. 103, § 10.

⁸ 1 Rev. Stat. Ind. 254, § 36.

⁹ Stat. Conn. 1854, p. 383, § 21.

¹⁰ Va. Code, 1849, ch. 110, § 4.

¹¹ 1 Ky. Rev. Stat. pp. 575-6; *Tevis v. McCreary*, 3 Met. (Ky.) 151.

¹² Rev. Stat. R. I. 1857, p. 506, § 21.

¹³ 1 Rev. Stat. Misso. 1855, p. 671, § 17.

¹⁴ Rev. Stat. Wis. 1858, p. 547, § 16.

¹⁵ Stat. Minn. 1858, p. 409, § 16.

¹⁶ Stat. Oregon, 1855, p. 407, § 16.

¹⁷ 2 Comp. Laws Mich. p. 853, § 16.

¹⁸ Comp. Laws Kansas, 1862, p. 480, § 12.

¹⁹ Gen. Stat. Verm. p. 412, § 5.

²⁰ Dig. Stat. Ark. 1858, p. 452, § 11.

²¹ It is questionable whether the widow may waive a pecuniary jointure made before marriage without her consent, except when made during her infancy, in Missouri, Kansas, and Rhode Island. 1 Rev. Stat. Misso. 1855, pp. 671-2, §§ 17, 18; Comp. Laws Kansas, 1862, p. 480, §§ 12, 13; Rev. Stat. R. I. 1857, p. 506, § 21. See, also, Gen. Stat. Verm. p. 412, §§ 5, 6.

²² 4 Kent, 56, note.

²³ *Shaw v. Boyd*, 5 S. & R. 309; *Ellmaker v. Ellmaker*, 4 Watts, 89; *Rudolph's Appeal*, 10 Barr, 34; *In re Gangwere's Estate*, 14 Pa. St. 417.

In Missouri,¹ it has been held, that dower may be barred by an equitable jointure, although not expressly provided for by statute; and the same principle has been applied to cases arising in other States.

37. The following case was determined in Massachusetts:² Previous to the marriage of I. V. with S. T. C., an indenture of three parts, sealed by the parties, was made and executed by and between I. V. of the first part, V. B. of the second part, and S. T. C. of the third part: I. V. therein covenanted and agreed with V. B., that in the event of the marriage taking place and his wife's surviving him, he would, "by his last will or otherwise," make a certain specified provision for her, by the payment of a gross sum to V. B., and by payment, or giving security for the payment to him of a further sum yearly during the widowhood of the intended wife, for her use, and to be paid to her by V. B. instead and in satisfaction of dower in the real, and of any distributive share of the personal estate of I. V.: V. B. covenanted and agreed with I. V. that he would accept the trust, and receive and pay over the money, for the use and benefit of S. T. C.; and the latter covenanted and agreed with I. V. and V. B. that in case the marriage took place, and she should survive I. V., and the money above mentioned should be provided to be paid, and actually paid, and the annuity well and sufficiently secured and provided to be paid, as stipulated in the indenture, the same should be in full satisfaction of her dower in the estate of I. V., and should bar her from claiming the same, if she should survive him, and should also be a bar to any claim on her part for any share in his personal estate, unless given her by his will. The marriage took place, and I. V. died, leaving a will, in which no reference was made to the indenture, but which contained a general direction for the payment of the testator's debts and performance of his obligations. The executor of I. V., within the time stipulated in the indenture, made the payments and gave the security therein specified to V. B., for the benefit of the widow, who refused to receive the same, but made a demand of dower in the real estate of I. V. and brought her action therefor. It was held, that by the indenture, a pecuniary provision was made for the benefit of the demandant, in lieu of dower, and

¹ *Logan v. Phillips*, 18 Misso. 22; *Johnson v. Johnson*, 23 Misso. 561; s. c. 30 Misso. 72. See 1 Rev. Stat. Misso. 1855, ch. 56, § 17.

² *Vincent v. Spooner*, 2 Cush. 467.

assented to by her, within the provisions of the statute, and that she was barred of dower.

38. By an agreement in contemplation of marriage, the intended husband bound his estate to pay to his intended wife certain sums of money, if she survived him, which were to be in bar of, and full compensation for her dower. It was held that this agreement barred dower.¹

39. An antenuptial agreement recited, in substance, that the parties contemplated marriage, but desired their property to be kept separate for their own use and for the use of their children respectively; and they covenanted with each other, that the wife should retain, control, and dispose of her personal property during the marriage, and appropriate the proceeds at her own discretion; in the event of the husband being the survivor, he bound himself to deliver to her children, or as she might direct, all of her personal property in his possession. In case the wife was the survivor, the agreement required the heirs and representatives of the husband to relinquish all right to her property. The husband also bound himself not to claim any estate of hers as tenant by the curtesy, and agreed that she might hold and enjoy her lands during the coverture; and if she survived him, that she should be paid from his estate the sum of six hundred dollars within sixty days after his death. In consideration of these provisions being performed, the wife covenanted with the husband, that she would "release and relinquish all right, title and claim to his estate, real or personal, to his heirs, executors, administrators or assigns." The court regarded this as a reasonable antenuptial agreement, and sufficient to bar dower.² They said: "We think it may be considered as well settled at this day, that almost any *bonâ fide* and reasonable agreement, made before marriage, to secure the wife in the enjoyment either of her own separate property, or a portion of that of her husband, whether during the coverture or after his death, will be carried into execution in a court of chancery."

40. An agreement was entered into before marriage, in the following form: "Articles of a marriage contract made, concluded, and agreed upon by and between I. E. of the one part, and M. S. of the other part, both of Earl township, Lancaster county, and State of Pennsylvania, witnesseth: that the said parties have agreed

¹ Findley v. Findley, 11 Gratt. 434. See Charles v. Charles, 8 Gratt. 486.

² Stilley v. Folger, 14 Ohio, 610.

to enter into the bonds of matrimony upon the following conditions: that is to say, that after marriage, if she, the said M. shall survive the said I., then, and in that case the heirs, executors or administrators of the said I., as the case may be, shall pay to the said M. the sum of one thousand dollars in one year after the decease of the said I.; and the sum of three hundred dollars yearly thereafter, during her natural life, and no longer; and, in consideration of the above sum or sums so agreed to be paid to her, the said M., she, the said M., does hereby relinquish and quit-claim to all right of dower to, in, or out of the estate of the said I., which she, in law, or in equity, or in any way might or could possibly have." It was held that this agreement was limited, by its terms, to the right of dower in the real estate, and did not exclude the widow from a share of the personalty under the statute of distributions.¹

41. Previous to their marriage, and in contemplation thereof, an agreement in writing was entered into between the parties, by which it was stipulated, that should the marriage take effect, and the wife survive her husband, his executors should pay to her within four weeks after his decease, the sum of one hundred dollars, in full of all claims which she might have on his estate in virtue of the marriage. This sum the intended wife, on her part, agreed to receive in lieu of dower, and in full satisfaction and discharge of all claims which she, by virtue of the marriage, might have upon the estate of her intended husband. The marriage took effect; the husband died before the wife, leaving real estate valued at six thousand dollars. The sum mentioned in the agreement was paid to, and received by the widow, within the time stipulated; and she thereupon executed and gave to the executors a receipt, acknowledging that she had received that sum in full satisfaction of dower in the estate of her late husband, and of all claims and demands which she had, or might have, on said estate. This instrument was not under seal. On a bill in chancery by the heirs of the husband, it was held that these facts constituted a bar of all claim by the wife upon his estate.²

42. The cases are not entirely agreed upon the question as to whether an antenuptial contract which merely secures to the wife her separate property, and makes no provision for her out of the

¹ *Ellmaker v. Ellmaker*, 4 Watts, 89.

² *Selleck v. Selleck*, 8 Conn. 85, note.

husband's estate, is a good equitable jointure; but in a majority of the cases it is held, that if it be a part of such agreement that the wife shall relinquish her dower, it will be good in equity.

43. A man and woman of advanced age, and each the owner of a large estate, real and personal, mutually agreed in contemplation of marriage, that the intended wife should hold and enjoy all her property to her sole and separate use, and should be entitled, on certain terms, to the avails of her personal labor during the coverture, which should be in full satisfaction of her right of dower in his real estate; the marriage took place, and the agreement of the husband was executed in good faith by him and his representatives; on a bill in chancery brought by his heirs and devisees against the widow for a release of her dower, which was stated, and found to be of the value of five hundred dollars, it was held, that such agreement was founded upon a sufficient and adequate consideration; that it was opposed to no rule of law or principle of sound policy; but was, on the contrary, highly beneficial, and therefore, though not a legal jointure, it was eminently entitled to the aid of a court of chancery to carry it into effect; and the relief sought was accordingly decreed.¹

44. A widow filed her petition against the heir and administrator of her deceased husband, claiming dower in the lands of which the latter died seized. The answer set up as a defence, an antenuptial contract, by which it was agreed, among other things, that the property, real and personal of each, which was about equal, should be brought together and enjoyed during coverture, and at the termination thereof the personal property should be separated and divided between the survivor and the representatives of the deceased, and the survivor should hold his or her said property, real and personal, and should thereafter have no right or interest in the property of the other, by reason of said coverture; that the contract had been performed by the parties thereto during coverture, and that since the decease of the husband, the petitioner had claimed and received from his representatives her share of the property, and the benefit of all provisions of the contract in her favor. It was held that these facts constituted a good equitable defence to the petition.²

45. Previous to a marriage, the parties executed written articles

¹ *Andrews v. Andrews*, 8 Conn. 79.

² *Murphy v. Murphy*, 12 Ohio St. 407.

of agreement, whereby, in consideration that the husband agreed to relinquish all claim to the property of the wife by virtue of the marriage, or otherwise, she agreed to relinquish, and did relinquish, all claim to dower; and therein covenanted, among other things, that she would not at any time claim anything from his estate. In accordance with this agreement, the wife held the property thus secured to her to her own separate use. It was held, that a decree of the probate judge, made after the death of the husband, granting the widow an allowance out of his estate, was erroneous.¹ "It is unnecessary," the court said, "to decide or investigate the question whether the antenuptial agreement entered into by the parties in the year 1847, would have the effect of precluding the wife under all circumstances from receiving an allowance or enforcing any claim against the estate of her late husband. There seems to be no reason why he might not, after the marriage, in the exercise of his marital rights, reduce her personal property to his possession, and appropriate it to other purposes than those for which it was intended by the agreement it should be used. If he might do this, his wife would have no remedy during the existence of the marriage. But in such case, it would seem proper and equitable, that she should be compensated out of his estate, for the property which by the agreement was to be kept separate therefrom. A state of facts might exist rendering it proper to inquire into and determine the effect of the agreement, and how far it should be considered as an estoppel upon her. But such facts do not exist here. It does not appear, that the husband violated the agreement in any particular. It was made upon a valuable consideration, and there is nothing in the case to show why, in addition to the benefits it gave her, she should receive an additional benefit from his estate."

46. In *Cauley v. Lawson*,² an agreement between parties pre-

¹ Heald's Petition, 2 Foster (N. H.), 265.

² *Cauley v. Lawson*, 5 Jones, Eq. 132. In the previous case of *Murphy v. Avery*, 1 Dev. & Bat. Law, 25, the court decided that such an agreement could not be enforced at law; "But it neither expressly, nor by implication held that *in equity*, the agreement would not be upheld and enforced." Opinion of the court, *Cauley v. Lawson*, *supra*. In the Alabama case of *Blackmon v. Blackmon*, 16 Ala. 633, an antenuptial agreement by which the wife, in consideration of the settlement upon her of her own estate to her sole and separate use, released and relinquished to her husband, all claim to dower in the lands of which he might be seized during coverture, was held invalid at law. Whether such an agreement is good in equity, was not determined by the court.

vously to, and in contemplation of marriage, that neither, after the death of one of them, should claim anything that had belonged to the other before marriage, was held sufficient, in equity, to exclude the woman from dower, a year's provision, and a distributive share of her husband's personal estate.

47. In *Gelzer v. Gelzer*,¹ the antenuptial agreement out of which the controversy arose, recited that the wife had, "in her own right, an ample estate intailed and secured to her, of which the said Thomas could not take any benefit after her death;" in consideration whereof, and of the nominal payment of one dollar, she covenanted and agreed, that if her husband should die, she surviving, she would not "have, claim, or demand, or pretend to have, claim, or demand, any dower, or thirds, or any other right, title, interest, claim or demand, of, in, or to, any of the messuages, lands, tenements and real estate whereof the said Thomas may have been seized during the intermarriage." It was held, that this agreement was sufficient in equity to exclude the widow from dower and a distributive share of the husband's real estate.

48. By articles entered into before the marriage, all the property of the wife, real and personal, together with her choses in action, was secured to her sole and separate use during the coverture. It was also provided, that she should have the right to dispose of the property during the marriage, by will, or otherwise, and that it should not be subject to the control of the husband, nor to the payment of his debts. In consideration of these provisions, the wife agreed that the estate of the husband, both real and personal, should be exempt "from all claim and right which she might otherwise acquire in the same by virtue of the contemplated marriage . . . either as dower, or otherwise." This was held a good equitable jointure.²

49. An antenuptial agreement was entered into in the following form: "Whereas, a marriage is about to be contracted by and between the parties to these presents, and they are desirous to regulate the mode of enjoyment and distribution of their separate property; therefore, in consideration of the said marriage, it is agreed by and between the said parties, that the separate property shall, during the joint lives of the said parties, form a fund from the income of which the said parties and their issue, if any, shall

¹ *Gelzer v. Gelzer*, 1 Bailey's Eq. 387.

² *Logan v. Phillips*, 18 Misso. 22.

be supported and maintained; and that, for the purpose of producing such income, the said W. (the intended husband) shall have the management of the said separate property of the said L. G. (the intended wife). It is also agreed by and between the parties, that, during the coverture either of said parties may, by gift or sale, in any manner or form whatever, dispose of one-third of his or her separate property, without the other's interposing any obstacle, and without any right in such part of the estate so disposed of remaining in the other party, so that the same shall be free and clear from any claim of such other party. It is also agreed by and between the parties aforesaid, that either of the said parties, at his or her death, may, by will, or declaration in the nature of a will, devise and bequeath to any person whatsoever, the absolute property, whatever of his or her said separate property may then remain, so that the survivor shall be entirely divested of all interest therein. It is also agreed, that on the death of either party, the survivor shall retain the full right and title in his or her separate property, and the property of the deceased party shall be distributed according to the laws then in force." It was held that this contract did not constitute a legal bar to dower within the statutes of Missouri;¹ neither did the naked agreement amount to an equitable jointure; that before the wife could be deprived of her dower, the agreement must be executed in her favor.²

50. In deciding the case above cited, the court said: "If, by the terms of the agreement, the things real and personal of the wife are to remain in specie her property beneficially, notwithstanding the coverture, such an agreement, constituting of itself a complete, perfect equitable ownership, may, perhaps, be very well considered so far executed as to be at once, without anything further, an equitable bar of dower, and to be pleaded as such. Where, however, the property consists in money, as in the present case, to be restored by the husband in gross on the dissolution of the marriage, or in things consumable to be restored in value and not in specie, something more than mere agreement is necessary to complete the equitable jointure. In such a case, equity will see that the wife has the benefit of the agreement before it deprives her of the provision made by law for her support. The naked agreement can not be allowed to divest her in equity of her legal rights in favor

¹ 1 Rev. Code Misso. 1825, p. 334.

² Johnson v. Johnson, 23 Misso. 561; s. c. 30 Misso. 72.

of volunteers, however it might be in regard to a purchaser who had bought the land on the faith of the wife's agreement to relinquish her dower in it."¹

51. The following marriage contract was entered into in Mississippi: "Know all men by these presents that we, W. W., of the State and county aforesaid, and L. C., of Franklin county, State of Mississippi, hath agreed to marry, and by these presents further contracted and agreed, that it is each of our desires to enjoy our property together, until death, and then each of us to dispose of our property as we may think best." It was held, that this was not such a contract as would bar the wife's dower.²

52. A female infant, in contemplation of marriage, with the consent of her parent and guardian, gave her bond, engaging, in consideration of five hundred dollars to be paid to her by her intended husband's executors, after his decease, to release her dower in lands of which he should die seized. After the death of her husband, the stipulated sum was paid to her, and she, by deed (being still a minor) released her dower to the heirs and representatives of her deceased husband, and the money was appropriated by her second husband to his own use. It was held that this agreement was not binding upon the wife, and that she might recover her dower without tendering the money.³ "There was in fact," said Gibson, J., "*no* settlement by the husband, who did not execute any agreement, or bind himself or his representatives. There was nothing but the bond of the wife, conditioned for the release of her dower, in consideration of five hundred dollars to be paid by the husband's executors; and it is settled, a jointure is not a contract by the wife for a provision, but an actual provision by the husband. What is there, then, in the case, but a naked contract by an infant in expectation of marriage, with the advice and consent of her parent and guardian, which, notwithstanding the opinion that seems to have been entertained in *Cannel v. Buckle*,⁴ and *Harvey v. Ashley*,⁵ is now finally settled to be altogether insufficient to bind her real estate, except, perhaps, in favor of the issue, where they are purchasers; and which she may, at the death of

¹ See, also, opinion of the court in s. c. 30 Misso. 72.

² *Whitehead v. Middleton*, 2 How. (Missis.) 692. See, also, *Faulkner v. Faulkner*, 3 Leigh, 255; *Succession of Doucet*, 13 La. Ann. 613.

³ *Shaw v. Boyd*, 5 S. & R. 309. See ante, ch. 12, §§ 31-33.

⁴ *Cannel v. Buckle*, 2 P. Wms. 243.

⁵ *Harvey v. Ashley*, Wilm. R. 219, note; 3 Atk. 612.

her husband, if she has then come of age, confirm or avoid at her election. It is argued that the bond operated as an implied covenant of the husband, but I know of no case to that effect; and if it were so, an agreement to settle an annuity might be implied in every case, and thus the infant's naked agreement would always bind her indirectly. Then, taking the contract to have been voidable, there is on these pleadings no act of confirmation by the *feme* herself, who was still an infant when she received the five hundred dollars."

53. By an antenuptial contract, the husband agreed that if his wife should survive him, and no provision should be made for her in his will in an amount equal to twenty thousand dollars, or if he should die intestate, and she, as his heir, should not receive from his estate an amount equal to twenty thousand dollars, then he charged his estate with the payment of twenty thousand dollars, or such sum as would make up that amount, to be held by trustees for her use for life, with reversion to the issue of the marriage; provided, that if she survived, she should have no part of the estate then owned by him, or which should be purchased by him after the first day of January then next ensuing. The husband purchased lands after the first day of January succeeding the date of the marriage contract, and died, leaving a will, by which, "in addition to the provisions made for his wife by the marriage contract," he gave to her some negroes and other personalty and an interest in some of his real estate. It was held that the wife was entitled to the provisions made for her by the marriage contract,—to the devises and bequests in her favor, and to dower in all the lands purchased by the husband after the first day of January succeeding the date of the marriage contract, so far as such claim of dower was consistent with the devises in her favor.¹

54. It is settled that a jointure will be equally good and binding upon the husband and wife, and bar her of dower, if it be not absolutely and completely settled upon her by deed, but rest merely in covenant or articles before the marriage, because a court of equity will decree a specific performance of such a covenant or articles, by directing a settlement which will have relation to the period when it ought to have been made.²

¹ *Cunningham v. Shannon*, 4 Rich. Eq. 135.

² 3 P. Wms. 269; 1 Roper, H. & W. 488. See *Vincent v. Spooner*, 2 Cush. 467; *Caruthers v. Caruthers*, 4 Bro. C. C. 507, note, 512, 513.

55. That the jointure, in order to be an absolute bar of dower, ought to be made before marriage, is equally a rule of equity as of law;¹ and in both jurisdictions, when the provision is a jointure after marriage within the statute of Henry VIII., but waivable by the widow, she will be obliged to elect between such jointure and her dower; but if such provision be not a legal jointure within the Act, then the law, as we have seen,² can not put her to an election, but she will be entitled to both the provision and her dower.³ Here the concordance between law and equity ceases; for courts of equity, acting upon the intention of the parties making and accepting the provision, and upon the conscience of the widow, oblige her to elect between her dower and the provision settled in jointure upon her, and on this principle, that it would be unconscientious in her to take a thing itself, and also that which is given in lieu of it; so that whether the provision be made before or after marriage, if it be not conclusive against her, but voidable only, she will not be permitted in equity to take both it and her dower, but will be put to her election between them.⁴ This equity doctrine is carried into the statutes of many of the States;⁵ and in some of them it is further provided, that if a conveyance intended to be in lieu of dower, shall, through any defect, fail to be a legal bar thereto, and

¹ *Townsend v. Townsend*, 2 Sandf. S. C. 711; *Crain v. Cavana*, 36 Barb. 410; *Martin v. Martin*, 26 Ala. 86; *Walsh v. Kelly*, 34 Pa. St. 84; *Carson v. Murray*, 3 Paige, 483; *Rowe v. Hamilton*, 3 Greenl. 63. See ch. xii., §§ 43-48.

² Ante, § 6 *et seq.*

³ Co. Litt. 36 b.

⁴ 1 Roper, H. & W. 488-9; *Parham v. Parham*, 6 Humph. 287.

⁵ 1 Rev. Stat. N. Y. 741, § 12; Gen. Stat. Mass. ch. 90, § 11; Rev. Stat. Me. 1857, ch. 103, § 11; 1 Rev. Stat. Ind. p. 254, § 40; Va. Code 1849, ch. 110, §§ 4, 5; Rev. Stat. R. I. 1857, p. 506, § 21; Comp. Laws Kansas, 1862, p. 480, §§ 12, 13; 2 Rev. Stat. Ky., by Stanton, p. 26, § 7; Dig. Stat. Ark. 1858, p. 452, § 12; Stat. Oregon, 1855, p. 407, § 17; Rev. Stat. Wis. 1858, p. 547, § 17; Stat. Minn. 1858, p. 409, § 17; 2 Comp. Laws Mich. p. 853, § 17; Gen. Stat. Verm. p. 412, §§ 5, 6. In the last named State it is provided, that if the widow was not the first wife of the deceased, and he shall have no issue by her, and an agreement was entered into between them previous to the marriage in relation to the widow's claim on the estate, in lieu of dower; and if, in the opinion of the court, she shall have a sufficient provision for her comfortable support during life, the court may deny to such widow her dower, or any provision except as provided by the agreement. *Ibid.* In Kentucky, it has been remarked, that "unless the transfer be made in satisfaction of her right to dower, the estate can not be said to be in lieu of dower. If it be transferred to her without reference to her dower, or without any intention that it shall be in satisfaction thereof, it can not, with any propriety, be said to be in lieu of dower." Per Duvall, J., in *Tevis v. McCreary*, 3 Met. (Ky.) R. 151.

the widow, availing herself of such defect, demand her dower, the estate and interest so conveyed shall thereupon cease and determine.¹

56. Upon a treaty of marriage, it was agreed by the husband, that in case there should be issue of the marriage, all the property to which the wife was entitled, either in possession or in action, should be settled upon her. The marriage took place, and after the birth of a son, the husband executed the following instrument: "Be it known to all whom it may concern, that I, J. L., of, &c., having intermarried with F. H., widow, &c., and by her having had one son, called R. L., I do hereby certify, that all the property which came by my said wife, of every description, I give to her and her heirs for ever. In witness," &c. The wife being the survivor, it was adjudged that she could not be compelled to elect between the provision thus secured to her and her rights under the law.² The court said: "The principle to be extracted from all the cases is, that an intention to exclude that right, must be shown, either by express words, or a manifest implication; but there is here nothing from which such an intent can be inferred."

57. In *Swaine v. Perine*,³ there was an antenuptial agreement made on the day of the marriage, between the husband and wife, by which she was to enjoy, exclusively for her own benefit, some real and personal estate. It was claimed by the wife, that the real estate consisted only of her right of dower as the widow of a former husband, in twelve acres of land, and that the personal estate was about nine hundred and fifty dollars, which she held as administratrix of her former husband. "There is nothing," said the chancellor, "to gainsay her answer to the cross-bill on this point, and this agreement was not stated to be in lieu of dower in the lands of her second husband; and there is no color for the suggestion that this agreement formed any impediment to her present claim."

58. It has been noticed as one of the requirements of a legal jointure, that it ought to be expressed in the instrument to be in satisfaction of the whole of the wife's dower, or at least of her

¹ 1 Rev. Stat. Ohio, p. 519, § 4; Va. Code, 1849, ch. 110, §§ 4, 5; *Craig v. Walthall*, 14 Gratt. 518; 1 Rev. Stat. Misso. 1855, ch. 56, § 19; *Logan v. Phillips*, 18 Misso. 22; Rev. St. R. I. 1857, p. 506, § 22; Comp. Laws Kansas, 1862, p. 408, § 14; *Nixon's Dig. Stat. N. J.* p. 210, § 13.

² *Liles v. Fleming*, 1 Dev. Eq. 185.

³ *Swaine v. Perine*, 5 John. Ch. 482.

dower in lands particularly described.¹ The practice of courts of equity so far agrees with the rules of law, that if it appear on the face of the instrument that the provision was only intended in satisfaction of part of the dower, leaving the proportion in uncertainty, and in respect of what lands dower was meant to be barred by it, such provision will not bind the widow, but she will be entitled to dower upon giving up the provision.²

59. With respect to parol averments, the rule of evidence is the same in equity as at law. It should be expressly stated in the instrument, or clearly appear from its contents, that the provision for the wife was intended to be in lieu or satisfaction of dower.³ But this intention may be manifested by the nature of the provision; and it will be sufficient if it can be clearly collected from the instrument that it was so intended.⁴ Thus, in *Vizard v. Longdale*,⁵ a bond was given by the husband before marriage, for the settling of an annuity of 14*l.* upon his wife, for life, for her livelihood and maintenance; Sir Joseph Jekyll decided that the provision was no bar of dower; but Lord King reversed the decree, stating it to be his opinion that it was within the equity of the statute of jointures, and a bar to dower.

60. A doubt was expressed by Lord Rosslyn of the authority of this case, in *Couch v. Stratton*.⁶ There, the husband covenanted by settlement before marriage, that his heirs, &c., should, within three months after his decease, pay to trustees 6,000*l.*, with interest from his death, upon trust, in case his wife should be the survivor, and there should be no issue then living, &c., to pay for her own use, 1,500*l.*, part of that sum, with interest, and also to pay to her the interest of the remainder during her life. Lord Rosslyn held that the provision did not bar her of dower.

61. Mr. Roper distinguishes this case from *Vizard v. Longdale*, and observes that there was no expression in the settlement as in *Vizard v. Longdale*, to show any intention that the provision was meant to be a jointure in satisfaction of dower.⁷ But Mr. Jacob

¹ Ante, §§ 21-25.

² 1 Roper, H. & W. 489; 1 Washb. R. P., 2d ed., p. 265, pl. 18. See Caruthers v. Caruthers, 4 Bro. C. C. 500.

³ Ante, §§ 21-25.

⁴ Worsley v. Worsley, 16 B. Mon. 469; Tevis v. McCreary, 3 Met. (Ky.) 151.

⁵ *Vizard v. Longdale*, Kelynge's Ch. Cas. 17, *sub nomine*, *Vizod v. London*; stated 3 Atk. 8; 1 Ves. Sen. 55; 2 Eden's Rep. 66; 13 Eng. Law & Eq. 408, note.

⁶ *Couch v. Stratton*, 4 Ves. Jr. 391.

⁷ 1 Roper, H. & W. 491.

remarks,¹ that "the settlement was expressed to be for making some provision for the wife and her issue. In *Walker v. Walker*,² where the expression was similar, Lord Hardwicke, said: 'The words *provision if she survive*, mean the same as in *Vizard v. Longdale*, and the word *some* makes no difference, for it is not said *some part*.'"³ Mr. Bright, adds:⁴ "It would seem that at the present day such a provision as that in *Vizard v. Longdale*, or *Couch v. Stratton*, would be held to be meant to be a jointure in bar of dower."

62. In the late case of *Hamilton v. Jackson*,⁵ by marriage articles the husband covenanted that in case he should die in the life of his wife, without issue by her, she should be entitled to one-half of what property, real or personal, he should die seized or possessed of, and that in preference to any creditor of his, or to any deed or will which he might make or execute in his lifetime contrary to the true intent and meaning of the articles. There being no issue of the marriage, it was held by Sir E. Sugden, C., that the wife surviving was entitled to one-half of the real and personal estate of which her husband died seized or possessed, but not to dower, or to a distributive share of the personalty.⁶

63. Where a *verbal* antenuptial agreement was made between parties in contemplation of marriage, by which the intended wife was permitted during coverture, to enjoy and dispose of her personal estate and the proceeds of her real estate, as if she were sole, and by which it was stipulated that in case she survived, she should claim no distributive share of her intended husband's personal estate, and no dower in his realty; and the husband accordingly did permit the wife, during coverture, to give to her children by a former marriage, the personal estate which before marriage was hers, and also the proceeds of her real estate; it was held, that the agreement was one made "upon consideration of marriage" within the statute of frauds; and that there was no such part performance as would, in equity, put it out of the operation of the statute. It

¹ 1 Roper, H. & W. 490, note.

² *Walker v. Walker*, 1 Ves. Sen. 54.

³ On this question see also *Garthshore v. Chalie*, 10 Ves. Jr. 1, 20.

⁴ 1 Bright, H. & W. 451.

⁵ *Hamilton v. Jackson*, 2 Jones & Lat. 295. See *Dyke, v. Rendall*, 13 Eng. Law & Eq. 404; s. c. 2 De G. M. & G. 209; *McCartee v. Teller*, 2 Paige, 511; s. c. 8 Wend. 267; *Shaw v. Boyd*, 5 S. & R. 309; *Levering v. Heighe*, 2 Md. Ch. Dec. 81; *Gould v. Womack*, 2 Ala. 83.

⁶ 1 Bright, H. & W. 451.

was further held, that such agreement was, under the circumstances stated, no bar to the claim of dower.¹ But where a parol antenuptial contract has been fully performed by the parties, it will be sustained in equity.²

64. In some of the States, it is held that the provision made for the wife by articles entered into before the marriage, must be fair and reasonable in order to warrant a court of equity in enforcing a specific performance against her. In *Gould v. Womack*,³ the principle was thus stated: "Equity has jurisdiction in this State, to enforce the performance of contracts fairly entered into between parties able to contract; but it is an appeal to the extraordinary power of the court, and therefore a court of chancery will not lend its aid to enforce specific performance of a contract unless it is just and reasonable in all its parts, and founded on adequate consideration. The jurisdiction of the court is not compulsory—the question is not what the court must do, but what it may do under the circumstances. Notwithstanding there is no legal bar to dower in this State, a court of equity may enforce the specific performance of an antenuptial agreement in lieu of dower, subject to the same rules by which it is governed in other cases of the specific performance of contracts."

65. In the foregoing case, a man fifty-six years of age, on the eve of marriage with a young woman, procured from her a relinquishment of dower in his estate, which was very large, on condition of his settling on her a life estate of small value, which she agreed to accept in lieu of dower, unless he should think proper to make an additional settlement on her at his death, before which event, which happened six years afterwards, he made his will, and gave her an annuity of fifteen hundred dollars a year during her life, and also the use for life of some land and slaves, and directed his executors to make annual provision for her support, upon the acceptance of which, she was not to be entitled to the property secured to her by the antenuptial contract. It was held, that this was not such an agreement as a court of chancery could be called upon specifically to enforce, on the ground that it was not just or reasonable: 1. Because the provision made by will pursuant to the

¹ *Finch v. Finch*, 10 Ohio St. 501. See *Hall v. Hall*, 2 M'Cord's Ch. 269, 274, 276, 277.

² *Dygart v. Remerschneider*, 39 Barb. 417.

³ *Gould v. Womack*, 2 Ala. 83.

expectation created by the antenuptial contract, was a life estate only, which, considering the age of the dowress, was of itself a sufficient objection; 2. Because, when compared with the legal dower, it was not an adequate provision, although ample for support.

66. In a South Carolina case,¹ a woman about to marry, agreed in writing to renounce all claims on the estate of her intended husband, in consideration of an undertaking on his part to make adequate provision for her. He made provision for her by will, and died. The court decided that it was inadequate proportioned to his estate, and enlarged it.

Jointures upon infants.

67. The question whether an infant is barred by a jointure made before marriage, was for a long time unsettled in England. Lord Coke, says: "If the jointure be made before marriage, the wife can not waive it and claim her dower at the common law."² And in a note in the handwriting of Lord Hale, in the margin of Coke's Institutes, he remarks: "Though she be within age, as we see, she can not waive." This note, made more than one hundred years previous to the final decision of the question in the House of Lords, appears to be the first *dictum* on the subject contained in the books.

68. The case of *Jordan v. Savage*,³ before Lord King, in 1733, seems to be the first reported decision in which the point was judicially considered. That was not a legal jointure under the statute; neither was the antenuptial provision set up in bar of legal dower. The estates of the husband were copyhold, in which, by the custom of the manor, the wife was entitled to the whole for life, as her free-bench. The land, by an antenuptial contract, was settled in such a manner as to give her only the moiety, on the death of her husband, in the nature of a jointure, and in lieu of her customary estate. The wife being an infant, the question was whether she had a right to waive the provision made by the contract, and claim her customary estate in the whole. And the court of chancery considered the antenuptial settlement an equitable bar of the customary provision of the infant, by analogy to the statute

¹ *Rivers v. Rivers*, 3 Desaus. 190.

² 1 Inst. 36 b.

³ *Jordan v. Savage*, 2 Eq. Ca. Abr. 102.

respecting jointures, and that the infant was bound to accept the provision as an equitable jointure.

69. In the case of *Sice v. Seys*,¹ in 1740, the lord chancellor asserted the same principle, though the question was not directly before him there. And it was again recognized in 1748, in the case of *Harvey v. Ashley*.² In a case before the master of the rolls in 1734,³ Sir Joseph Jekyll, is said to have held different language. By a note of that case from the register's book, however, it will be found that the wife claimed the right of election, on the ground that it was not agreed that the antenuptial provision should be in lieu of dower.⁴ The question as to an infant's being bound by a jointure, it is presumed could not have been discussed in that case; and it is very improbable that a master of the rolls would undertake to overrule the decision which the lord chancellor had made but a few months before in the case of *Jordan v. Savage*.

70. In 1760, the case of *Drury v. Drury*, came before Lord Henley, afterwards Earl of Northington, and was twice argued at great length, occupying in the whole seven days. It resulted in a decision by him, that an infant was not barred of her dower, either by a legal or an equitable jointure. The cause came before the House of Lords on appeal, (1762), and this disputed question was finally put at rest in that country. Although three very respectable common law judges concurred in opinion with Lord Henley, that an infant is not bound by a jointure in any case, yet the weight of authority, as well as the weight of judicial talent, was clearly in favor of the decision of the House of Lords, on the appeal. This case, as reported by Brown,⁵ merely contains the statement of the case, the arguments of counsel, and the reversal of the decree. But in the notes of the judgments and opinions of Ch. J. Wilmot, published forty years afterwards, his very able and elaborate opinion on this question is now found.⁶ He examined the subject at great length, and with much ability, and seems to have exhausted thereon the whole store of ancient learning, in relation to the rights and liabilities of infants. He concurred in opinion with the majority

¹ *Sice v. Seys*, Barnard. Ch. R. 117.

² *Harvey v. Ashley*, Wilm. R. 219, note.

³ *Cray v. Willis*, 9 Vin. Abr. 249.

⁴ See 1 Roper, H. & W. 476.

⁵ *Earl of Buckingham v. Drury*, 3 Bro. P. C. 492.

⁶ *Drury v. Drury*, Wilmot's Opinions, 177. This opinion is republished in full in 8 Wend. 303, *et seq.*

of the common law judges, that the infant was barred. And by a reference to the report of this case by a grandson of Lord Northington,¹ more recently published, it appears that Lord Hardwicke concurred with a majority of the judges, and delivered a most able opinion on the question in the House of Lords. It also appears that Lord Mansfield, then a member of the house of peers, took part in the decision, and voted in favor of a reversal of the decree.

71. In that case, the antenuptial contract was entered into by the lady while under age, and was executed by her in the presence of her guardian, who subscribed the same as a witness. The husband agreed that in case his intended wife should survive him, his heirs, executors, or administrators should pay her, during her life, an annuity of 600*l.* for and in the name of her jointure; which provision she agreed to accept in full satisfaction of her dower, and of her allowance under the statute of distributions. It was therefore finally settled by that case, that an infant is bound at law by a legal jointure; and that in equity, in analogy to the legal rule, the infant may also be barred by an equitable jointure settled upon her before marriage, by the consent and approbation of her parents or guardian. Although some members of the profession entertained doubts of the correctness of this decision, yet as it was made by the court of the last resort, and with the entire approbation and concurrence of the most distinguished judges in England, it became the settled law of the land as to all cases coming within the same principles. And being made previous to our separation from the mother country, it has been considered equally binding on us here. An equitable jointure, or a competent and certain provision for the wife, in lieu of dower, if assented to by the father or the guardian of the infant before marriage, and to which there is no other objection but its mere equitable quality,² is therefore an equitable bar.³

72. In *McCartee v. Teller*,⁴ Chancellor Walworth says: "An

¹ 2 Eden's Rep. 60.

² *Corbet v. Corbet*, 1 Sim. & Stu. 612; *Jacob's note*, 1 Roper, H. & W. 478. See, also, *Harvey v. Ashley*, 3 Atk. 612; *Vizard v. Longden*, 2 Eden, 66; *Boyn-ton v. Boyn-ton*, 1 Bro. C. C. 445; *Williams v. Chitty*, 3 Ves. Jr. 545.

³ Per Walworth, Chancellor, in *McCartee v. Teller*, 2 Paige, 511, 556-9; s. c. 8 Wend. 267; *Levering v. Heighe*, 2 Md. Ch. Dec. 81; 1 Washb. R. P., 2d ed., p. 264, pl. 16. See *Shaw v. Boyd*, 5 S. & R. 309; *Temple v. Hawley*, 1 Sandf. Ch. R. 153; *Lee v. Stewart*, 2 Leigh, 76.

⁴ *McCartee v. Teller*, *supra*.

adult female might in equity bind herself by an antenuptial agreement to receive a simple pecuniary provision, although uncertain as to the time of its commencement, or as to the extent of its duration.¹ To make a mere equitable jointure binding on the infant, it was necessary that the provision should be as beneficial to the infant, and as certain as that required in a legal jointure to constitute a legal bar. In other words, it must be a provision to take effect in possession or profit immediately on the death of the husband,² and to continue during the life of the widow;³ it must be made with the express or implied assent of the parent or guardian, and in satisfaction or in lieu of dower;⁴ and it must be a reasonable and competent livelihood for the wife,⁵ in reference to the circumstances and situation in life of the parties, the value of the husband's estate, and the extent of the wife's portion received with her on the marriage."⁶

73. It was held by the chancellor, in the case from which the above quotation is made, that an antenuptial contract entered into by a husband with an infant and her guardian, by which she was to receive a certain annual sum during her *widowhood*, in lieu of dower, did not bind her, and that after the death of her husband she might disaffirm the agreement and claim her dower.⁷

74. In *Caruthers v. Caruthers*,⁸ the husband, previously to the marriage with his wife, then an infant of the age of seventeen years, settled an estate (which was in the possession of the mother) on the mother for life, remainder to himself for life, remainder to his intended wife for life, if she survived him and his mother, in part of the jointure and provision intended to be made and secured for her, and in lieu, bar, recompense, and full satisfaction of all demands or thirds, at common law, or by custom or otherwise, of all the messuages, &c., of which the husband might be seized during the marriage. The wife's father was a party to this settlement. No notice was taken in the settlement of what was to be the other

¹ Per Lord Alvanley, 4 Bro. C. C. 513; Clancy, *Rights of Women*, 221-2; 1 Madd. R. 613; ante, § 34, *et seq.*

² Ante, §§ 9-12.

³ Ante, §§ 13-17.

⁴ Ante, §§ 21-25.

⁵ See ante, § 29; post, §§ 78, 79.

⁶ 1 Inst. 36 b.; 4 Kent, 53; *Wilmot's Opinions*, 209; *Levering v. Heighe*, 2 Md. Ch. Dec. 81. See *Gould v. Womack*, 2 Ala. 83.

⁷ *McCartee v. Teller*, 2 Paige, 511; affirmed, 8 Wend. 267. But see the opinion of Mr. Justice Nelson, delivered in the Court of Errors; see, also, ante, §§ 14-16.

⁸ *Caruthers v. Caruthers*, 4 Bro. C. C. 500.

part of the jointure; but before the marriage, the husband's uncle surrendered a copyhold estate, which was recited to have been made for making some further provision for the marriage, the uses of which surrender were limited to the uncle for life, remainder to the husband for life, remainder to the wife for life, if she so long continued a widow; but it was not stated to be in lieu or bar of dower. The husband's uncle died before him; his mother survived him. The question was whether the widow was bound by these provisions as a jointure. And Lord Alvanley decided in the negative.

75. In this case it was admitted that the jointure was not good at law, and Lord Alvanley held that, as it only gave to the infant an uncertain and precarious provision, part of which she might never live to enjoy, it could not be established against her in equity as an agreement. He thought that *Drury v. Drury* did not mean to decide that the guardian could bind the infant to accept an uncertain provision, for in that case the wife had a provision as certain as her dower; and the court could not perform such an agreement without seeing that it was reasonable.

76. In *Smith v. Smith*,¹ the settlement made on the marriage of a female infant provided that on the husband's death his personal estate should be distributed according to the custom of London; and that, in case of his purchasing lands, the wife should, if she survived, have the same share of the lands as of the personal estate, and this was declared to be in lieu of dower and thirds. The husband afterwards became bankrupt. It was held, that the wife's right to dower was not barred by the settlement.²

77. It seems that a jointure on an infant is not void, though the enjoyment of it may be uncertain by reason of the husband's title to the settled property being defective. If the defect be cured, she will be bound to accept the jointure in lieu of dower.³ If, on the other hand, the jointure fail, she will be entitled to recover the amount out of the estates of which she is dowable, as in other cases where a jointress is evicted.⁴

78. As to whether competency in point of amount is essential to an equitable jointure, Mr. Roper remarks:⁵ "From *dicta* in some

¹ *Smith v. Smith*, 5 Ves. Jr. 189.

² 1 Roper, H. & W., by Jacob, 480-2.

³ See *Ambler v. Norton*, 4 Hen. & M. 23.

⁴ *Corbet v. Corbet*, 1 Sim. & Stu. 612; 1 Roper, H. & W., by Jacob, 482. See post, § 82, *et seq.*

⁵ 1 Roper, H. & W. 485.

cases it has been inferred, that jointures in equity upon infants, although not within the statute, would be binding if such provisions were competent.¹ But what shall or shall not be so considered, is so vague and uncertain, as, it would seem, to afford no sufficient *data* to induce a court of equity to interpose and compel a person to abandon a legal ascertained right in consideration of a provision at the time deemed to be competent, but which may happen in the result to prove far below the value of the legal title in lieu of which it was substituted, as seems to have happened in the above case of *Williams v. Chitty*.² The inconvenience that would attend this doctrine appears to have presented itself to the mind of Lord Thurlow in *Durnford v. Lane*,³ when he said, he thought that the court should not go into the competence of the settlement. And this case appears to have been approved of by Lord Eldon in *Milner v. Lord Harewood*.⁴

79. But Mr. Jacob observes upon this point:⁵ "The rule established by *Drury v. Drury*, and the other cases referred to above, appears to be, that a female infant may be barred of dower by an antenuptial settlement of any species of property, made with the assent of her parents or guardians, if the provision secured to her be reasonably certain and competent. There has not, indeed, been any express decision that competency in point of amount is essential to an equitable jointure on an infant, but it appears to be a necessary consequence from the reasoning in *Drury v. Drury* and *Caruthers v. Caruthers*, and from the general expressions, that the agreement will not be binding in equity on the infant unless it be reasonable.⁶ If the jointure be so scanty as to be merely illusory, it seems to be clear that it will not be established; on the other hand, it was decided in *Drury v. Drury*, that it is not necessary that it should be equal in value to the dower; and it seems to be sufficient if the provision be one which it was fair and prudent for the parent or guardian to assent to. It must be admitted, however, that the rule by which the validity of such agreements depends upon their being reasonable, leaves room for many questions, for the decision of which, the cases do not furnish any certain criterion."⁷

¹ *Cannel v. Buckle*, 2 P. Wms. 244; *Harvey v. Ashley*, 3 Atk. 612.

² *Williams v. Chitty*, 3 Ves. Jr. 545. ³ *Durnford v. Lane*, 1 Bro. C. C. 116.

⁴ *Milner v. Lord Harewood*, 18 Ves. Jr. 275.

⁵ 1 Roper, H. & W. 486, note.

⁶ 4 Bro. C. C. 513. See 1 Bro. C. C. 153.

⁷ 1 Bright, H. & W. 459-462.

80. Upon the necessity of the assent of parents or guardians, Mr. Jacob, says:¹ "Though the assent of parents or guardians is generally mentioned as material to the validity of a jointure on an infant, it does not seem to be in all cases indispensable. With respect to legal jointures, as they are, according to *Drury v. Drury*, binding independently of contract,² when fairly made and conformable to the statute, the assent of parents or guardians is material only for the purpose of obviating any suspicion of fraud, and of evidencing the fairness of the transaction. It seems to follow that their assent is not necessary, if the fairness of the transaction appears from other circumstances, and the jointure be in other respects free from legal objections. Probably the analogy would be followed with respect to equitable jointures, at least where the want of the concurrence of a parent or guardian is reasonably accounted for, as in the case of their being dead or absent, or where, as in *Williams v. Chitty*,³ the settlement is made on the supposition of the wife being of age at the time."⁴

81. In New York,⁵ Massachusetts,⁶ Maine,⁷ Kentucky,⁸ Illinois,⁹ Connecticut,¹⁰ Delaware,¹¹ Indiana,¹² Arkansas,¹³ Wisconsin,¹⁴ Minnesota,¹⁵ Michigan,¹⁶ and Oregon,¹⁷ a jointure is not binding upon the wife unless assented to by her; if she be under age she may give her assent by joining with her father or guardian in the conveyance. In Indiana, the assent of an infant wife is not valid unless the father, or if he be dead, the mother, or if there be no mother, the guardian, join therein.¹⁸ In Ohio,¹⁹ Virginia,²⁰ New Jersey,²¹ Delaware,²² Kentucky,²³ Kansas,²⁴ Missouri,²⁵ and Rhode Island,²⁶

¹ 1 Roper, H. & W. 486, note.

² Ante, § 30.

³ *Williams v. Chitty*, 3 Ves. Jr. 545.

⁴ See, however, the remarks of Sir J. Leach, M. R., in *Simson v. Jones*, 2 Russ. & M. 377.

⁵ 1 Rev. Stat. N. Y. 741, § 10.

⁶ Gen. Stat. Mass. ch. 90, § 9.

⁷ Rev. Stat. Maine, 1857, ch. 103, § 9.

⁸ Rev. Stat. Ky. 1852, p. 393, § 7.

⁹ 1 Stat. Ill. 1858, p. 152, § 8.

¹⁰ Stat. Conn. 1854, p. 383, § 21.

¹¹ Del. Rev. Code, 1852, ch. 87, § 3.

¹² 1 Rev. Stat. Ind. 1852, p. 254, § 36.

¹³ Dig. Stat. Ark. 1858, p. 452, §§ 9-11.

¹⁴ Rev. Stat. Wis. 1858, p. 547, § 15.

¹⁵ Stat. Minn. 1858, p. 409, § 15.

¹⁶ 2 Comp. Laws Mich. p. 853, § 15.

¹⁷ Stat. Oregon, 1855, p. 671, § 15.

¹⁸ 1 Rev. Stat. Ind. 1852, p. 254, § 39.

¹⁹ 1 Rev. Stat. Ohio, ch. 38, § 2.

²⁰ Va. Rev. Code, 1849, ch. 110, § 5; *Craig v. Walthall*, 14 Gratt. 518.

²¹ Nixon's Dig. p. 210, § 12.

²² Del. Rev. Code, 1852, ch. 87, § 3.

²³ 2 Rev. Stat. Ky. by Stanton, p. 26, § 7.

²⁴ Comp. Laws Kansas, 1862, p. 480, § 13.

²⁵ 1 Rev. Stat. Misso. 1855, p. 672, § 18.

²⁶ Rev. Stat. R. I. 1857, p. 506, § 21.

if the jointure be made during the infancy of the wife, she may, at her election, waive it, and demand her dower.

Remedy where the widow is evicted of her jointure.

82. Where a widow having a legal jointure is evicted of the whole or a part of it¹ by a superior title, she is, under the statute of 27 Henry VIII., chap. 10, § 7, entitled to be endowed of as much of the residue of her husband's real estate as the land of which she is evicted amounts to.² This provision has been re-enacted in many of the United States.³

83. The right of the widow to be endowed in such cases, exists whether the jointure has been made before or after the marriage;⁴ and if the eviction of the jointure lands take place during the coverture, the widow has the same right to compensation by endowment out of the other estates.⁵ If the husband has aliened his other estates, the widow's right to dower being revived on the eviction, she may enforce it at law against the purchaser.⁶ And the wife's acceptance, after the death of her husband, of a part not evicted, will not defeat her claim to a recompense for the part evicted.⁷

84. The effect of the eviction is to remit the widow to her dower

¹ Gervoyes's case, Moore, 717.

² 1 Roper, H. & W. by Jacob, 493; 3 Prest. Abstr. 377.

³ Gen. Stat. Mass. 1860, ch. 90, § 13; Rev. Stat. Maine, 1857, ch. 103, § 13; 1 Rev. Stat. Ind. 255, § 42; 1 Rev. Stat. Ohio, ch. 38, § 5; St. Clair v. Williams, 7 Ohio, part 2, 110; Rev. Stat. Ky. 1852, p. 393, § 8; 1 Rev. Stat. Misso. 1855, p. 672, § 18; Stat. Conn. 1854, p. 383, § 21; Rev. Stat. R. I. 1857, p. 506, § 23; Comp. Laws Kansas, 1862, p. 480, § 12; Rev. Stat. Wis. 1858, p. 548, § 20; Stat. Minn. 1858, p. 409, § 20; Del. Rev. Code, 1852, ch. 87, § 4; Stat. Oregon, 1855, p. 407, § 20; Nixon's Dig. Stat. N. J. p. 210, § 11; 2 Comp. Laws Mich. p. 853, § 20; Code Va. 1849, p. 475, § 6; Gen. Stat. Verm. p. 413, § 11. This clause, although contained in the Act of 1787, is omitted in the Revised Statutes of New York. See 4 Kent, 9th ed., p. 56, note b. Mr. Hilliard, observes, that "in the absence of any statutory provision, the English rule undoubtedly prevails." 1 Hilliard, R. P., 2d ed., p. 197, § 68. As the English rule is founded upon an express statute, and as the legislature, in revising the laws, have repealed the Act of 1787, without retaining the provision in question, this may be a matter of some doubt. By the Act of 1849, "all contracts made between persons in contemplation of marriage, shall remain in full force after such marriage takes place." Acts of 1849, ch. 375, p. 529, § 3; 3 Rev. Stat. N. Y., 5th ed., p. 240, § 79. See Dygert v. Remerschneider, 39 Barb. 417.

⁴ Gervoyes's case, Moore, 717; Beard v. Nutthall, 1 Vern. 427.

⁵ Gervoyes's case, Moore, 717.

⁶ Maunsfield's case, Co. Litt. 33 a., note 8.

⁷ Gervoyes's case, Moore, 717; 4 Co. 3 b., note (c. 1).

pro tanto ; if the value of the dower be greater than that of the jointure, she recovers the amount of the latter only.¹ If the value of the jointure be greater than that of the dower, she is not entitled, under the statute, to recover anything beyond her dower ;² and she will only be entitled to hold the lands recovered during her life, though her jointure may have been settled on her in tail or in fee simple.³

85. But if the jointure be made by an antenuptial settlement, in consideration of which the wife, being adult, expressly agrees to relinquish her dower, and she is afterwards evicted, it seems that although her right to dower is revived at law, she will, in equity, be precluded from claiming it against a purchaser of other lands of the husband not charged with the jointure.⁴ Thus, in *Simpson v. Gutteridge*,⁵ where a jointure rent-charge had been settled in pursuance of articles made before marriage, the wife being of age at the time, it was held, that she was barred from all claims of dower, and therefore that a purchaser of other lands belonging to the husband was not entitled to call for the production of the title to the rent-charge. But the wife is at liberty to resort to any remedies she may have against her husband's assets by covenant or otherwise.⁶

86. Where the jointure is equitable, the consequences of eviction will, it is presumed, be the same as if it were legal. In *Drury v. Drury*, Lord Hardwicke, observed, that if the husband, who, on marrying an infant had covenanted for the payment of an annuity by way of jointure, had dissipated his property, that would have been an eviction in equity, and consequently would have given the wife a right to dower, like the case of an eviction at law.⁷ So it has been suggested, that if, on the marriage of an infant, an annuity charged on money in the funds in the names of trustees, were settled by way of jointure, and the funds were wasted by the trustees,

¹ 1 Sim. & Stu. 620.

² See *Beard v. Nutthall*, 1 Vern. 427 ; *Tew v. Winterton*, 3 Bro. C. C. 489 ; 1 Ves. Jr. 451.

³ 4 Co. 3 b.

⁴ 1 Roper, H. & W. 493 ; 1 Greenl. Cruise, *202, § 53.

⁵ *Simpson v. Gutteridge*, 1 Madd. 609. See post, § 87.

⁶ *Beard v. Nutthall*, 1 Vern. 427 ; *Dyke v. Rendall*, 13 Eng. Law & Eq. 404 ; s. c. 2 De G. M. & G. 209 ; *Tevis v. McCreary*, 3 Met. (Ky.) 151 ; post, § 89.

⁷ 2 Eden, 68 ; acc. *Hastings v. Dickinson*, 7 Mass. 153, 155 ; *Gibson v. Gibson*, 15 Mass. 106, 111.

this would amount to an eviction, and the widow would not be restrained from proceeding for her dower.¹

87. In *Tew v. Winterton*,² the husband gave a bond to secure an annuity to the wife in case of her surviving, and by a memorandum subscribed to the bond, she declared, that she accepted the said jointure in bar and satisfaction of all dower and thirds. On the husband's death, the court decreed the payment of the annuity out of his assets, and in case they should not be sufficient, then out of certain estates of which he was tenant in tail, provided the deficiency did not exceed the amount of the dower to which the wife would have been entitled, if she had not, by the memorandum accepted the annuity. This was said by Lord Thurlow, to be a very subtle equity,³ and the case appears to be at variance with *Simpson v. Gutteridge*, unless the memorandum signed by the wife was looked upon as amounting only to a conditional relinquishment of her right to dower.⁴

88. Where a marriage contract fixing the share of the wife in her husband's estate, was destroyed by the husband during the coverture, and after his death the act of the husband was ratified by the wife, it was held that she was restored to her dower.⁵ And where by an antenuptial contract, it was agreed that the husband should provide by will for an annuity to his widow for her life, with an interest in a certain part of his real estate, in lieu of dower or any portion of his estate; and the husband, by will gave her an annuity during her widowhood only, it was held that he had failed to perform upon his part, and that the wife was not bound by the agreement.⁶ So where it was stipulated by marriage articles that the wife should receive no portion of the estate possessed by the husband at the time of the marriage; but the husband deserted his wife, and failed to provide for her, and she was compelled to support herself by her daily labor, it was decided that the antenuptial contract did not prevent her from demanding dower even from a purchaser.⁷

¹ See 2 Sugd. V. & P., 10th ed., 220; 1 Washb. R. P., 2d ed., p. 266, pl. 20.

² *Tew v. Winterton*, 3 Bro. C. C. 489.

³ 1 Ves. Jr. 452.

⁴ 1 Roper, H. & W. by Jacob, 493-4; 1 Bright, H. & W. 468-470.

⁵ *In re Gangwere's Estate*, 14 Pa. St. (2 Harris), 417.

⁶ *Sheldon v. Bliss*, 4 Seld. 31; s. c. 7 Barb. 152.

⁷ *Spiva v. Jeter*, 9 Rich. Eq. 434.

89. In a recent English case,¹ it was held by Lord St. Leonards, that in the court of chancery, the equitable bar of dower depends entirely upon the doctrine of contract; that an adult lady may agree to take any consideration or security she pleases, and that she takes it with all its defects.² In that case, upon the marriage of an adult lady, a settlement was made which was recited to be "for providing a competent jointure and provision of maintenance" for the lady in case she should outlive her intended husband, and for securing a provision for their issue; and it was agreed that the intended husband should give a bond to the trustees of the settlement, conditioned for the payment of 2000*l.* within six months after the marriage, to be held by them upon trust for the husband for life, then for the wife for life, and then for the children of the marriage. The husband duly gave the bond, but only paid a small portion of the 2000*l.*, and died, having sold real estate of which he was seized during the marriage. It was adjudged that the settlement was a good equitable bar of dower, and that the widow was not entitled to a lien upon the estate in respect of the provision that had failed.³ "If it were a jointure purporting to create a legal bar within the statute," said the lord chancellor, "it would be different, and the case would stand upon the law as to eviction; but in this court, the bar stands simply upon the question of contract. My opinion therefore is, that if an adult lady contracts to accept any given thing in satisfaction of her dower, she must take that thing with all its faults and all its defects; we must look to the contract only; and by no analogy to the legal rule can she, in case of eviction from what she contracted for, come against the lands out of which she might have otherwise been entitled to dower. Of course this has nothing to do with the performance of the covenant of the husband to give the bond; he must of course perform it if he desires to keep the estates free from dower; he must do the act contracted for; that depends upon the common doctrine of this court. . . . Now, though, in the events which have happened, the money has not been paid, yet I am clearly of opinion that this lady has no right to resort to the lands acquired by the husband after marriage. I altogether differ from the observations of Sir A. Hart, in the case of *Power v. Sheil*, upon this question."

¹ *Dyke v. Rendall*, 13 Eng. Law & Eq. 404; s. c. 2 De G. M. & G. 209.

² See ante, §§ 33, 34.

³ Overruling *dictum* in *Power v. Sheil*, 1 Mol. 311.

Conveyance of the wife's jointure.

90. If husband and wife join in conveying lands settled upon the wife as a jointure before the marriage, her interest in the jointure lands will be extinguished, and she will be precluded from claiming dower in the residue of her husband's freehold estates; because her right of dower was barred by the jointure, and the latter is extinguished by the conveyance.¹ But if the jointure had been made after the marriage, and the wife joined in a conveyance, although she would be barred of her jointure, she might nevertheless claim her dower out of the other freehold lands of her husband; for the estate in jointure being but a conditional bar of dower, namely, upon the wife's consenting to it after her husband's death,² she may, notwithstanding the conveyance, disagree to the jointure, and elect to take her dower.³

¹ Co. Litt. 36 b.

² Ante, § 26.

³ Dyer, 358 b.; 1 Bulstr. 173; 1 Leon. 285; 1 Roper, H. & W. 520; 1 Washb. R. P., 2d ed., 264, pl. 14. See 1 Bright, H. & W. 464-7.

CHAPTER XVI.

DEVICES IN LIEU OF DOWER.

§ 1-6. The general doctrine.	69-72. Bequest of personal interest.
7-25. Devise of lands in which the widow is entitled to dower.	73-83. Devices during widowhood.
26-31. Devise of lands in trust for sale.	84-106. Provisions inconsistent with dower.
32-40. Devise to widow of the entire estate.	107, 108. Parol evidence inadmissible to explain will.
41, 42. Interests <i>in futuro</i> devised to the widow.	109. Statutory modifications in England.
43-68. Devise of rent or annuity charged upon lands of which the widow is dowable.	110-113. Statutory changes in the United States.

The general doctrine.

1. It has been observed that in general a widow's right to dower can not be barred at law by a collateral satisfaction, except in cases where the provision comes strictly within the operation of the statute of jointures.¹ The courts of equity, however, have extended the legal rule, and in instances of testamentary provisions by the husband for his widow, it is the practice of those courts to consider them in the nature of *equitable* jointures,² although not conforming to the strict requisites of the Act, whenever it appears that they were intended to be in lieu of dower. In cases of this nature the widow may be compelled to elect between the provision made for her in the will and her dower under the law.

2. The doctrine of election is founded upon this principle, that a person shall not be permitted to claim under any instrument, whether it be a will or a deed, without giving full effect to it in every respect, so far as such person is concerned; the equity of the court of chancery operating upon the devised interest *quousque* satisfaction be made to the disappointed devisee. But the courts have adopted a distinction between that class of cases which relates to the election of widows between dower and provisions under the wills of their husbands and the ordinary cases to which the doctrine is applicable. As dower is a legal right, the rule, as settled by modern English decisions, requires that in order to deprive a widow of its enjoyment by voluntary gift, it must appear, either

¹ See ch. xv.

² See ch. xv. §§ 33-66.

by express words or by clear and manifest implication, that the testator meant to exclude her from it.¹ "If," observes Lord Redesdale,² "there be anything ambiguous or doubtful—if the court can not say that it was clearly the intention to exclude,—then the averment that the gift was made in lieu of dower can not be supported; and to make a case of election, that is necessary; for a gift is to be taken as pure until a condition appear. . . . The only question made in all the cases is, whether an intention, not expressed by apt words, could be collected from the terms of the instrument. . . . The result of all the cases of implied intention seems to be, that the instrument must contain some provision inconsistent with the assertion of a right to demand a third of the lands to be set out by metes and bounds." The difference of opinion which may be found in the cases is not to be ascribed to any doubt of the correctness of this rule, but merely to the difficulty of applying it to the facts of each particular case.³

3. Although the English doctrine upon this subject has been materially changed in many of the States,⁴ in others it has been adopted in its fullest extent. The New York statute provides that "If lands be devised to a woman, or a pecuniary or other provision be made for her by will, *in lieu* of her dower, she shall make her election whether she will take the lands so devised, or the provision so made, or whether she will be endowed of the lands of her husband;"⁵ and under this enactment it has been uniformly held, in numerous cases, that in order to compel the widow to elect between her dower and the provisions in her favor contained in the will of her husband, the will must expressly declare the provisions to be in lieu of dower, or its terms must be such as to show an evident intention on the part of the testator to exclude that right.⁶ "The inquiry," said Chancellor Kent in *Adsit v. Adsit*,⁷ "is whether

¹ 1 Roper, H. & W. 566–576. ² In *Birmingham v. Kirwan*, 2 Sch. & Lef. 452.

³ 1 Roper, H. & W. 576; 1 Bright, H. & W. 546–8.

⁴ Post, §§ 110–113.

⁵ 1 Rev. Stat. N. Y. 741, § 13.

⁶ *Jackson v. Churchill*, 7 Cow. 287; *Adsit v. Adsit*, 2 John. Ch. 448; *Smith v. Kniskern*, 4 John. Ch. 9; *Rathbone v. Dyckman*, 3 Paige, 9; *Wood v. Wood*, 5 Paige, 596; *Fuller v. Yates*, 8 Paige, 325; *Irving v. De Kay*, 9 Paige, 521; *Sanford v. Jackson*, 10 Paige, 266; *Havens v. Havens*, 1 Sandf. Ch. 324; *Sheldon v. Bliss*, 4 Seld. 31; *Lewis v. Smith*, 5 Seld. 502; s. c. 11 Barb. 152; 9 Leg. Obs. 292; *Leonard v. Steele*, 4 Barb. 20; *Stewart v. McMartin*, 5 Barb. 438; *Lasher v. Lasher*, 13 Barb. 106; *Church v. Bull*, 2 Denio, 430; s. c. 5 Hill, 206; *Palmer v. Voorhis*, 35 Barb. 479; *Tobias v. Ketchum*, 36 Barb. 479; s. c. 32 N. Y. 319. See *Havens v. Sackett*, 15 N. Y. 365.

⁷ *Adsit v. Adsit*, 2 John. Ch. 448; 4 Kent, 58.

such an intention in the testator is to be collected by clear and manifest implication from the provisions in the will. To enable us to deduce such an implied intention, the claim of dower must be inconsistent with the will and repugnant to its dispositions, or some of them. It must, in fact, disturb or disappoint the will." "To bar her of her dower by implication," remarked Chancellor Walworth in *Sanford v. Jackson*,¹ "where the testator has not, in terms, declared his intention on the subject by his will, the provisions of the will, or some of them, must be absolutely inconsistent with her claim of dower; so that the intention of the testator will be defeated as to some part of the property devised or bequeathed to others, if she takes her dower as well as the provision made for her in the will. And to deprive the wife of her dower, or to compel her to elect, it is not sufficient that the provisions of the will render it doubtful whether the testator intended she should have her dower in addition to the provision made for by the will."

4. The principle above laid down has been applied to cases arising in the courts of South Carolina,² Georgia,³ Connecticut,⁴ and Iowa.⁵ The same rule formerly prevailed in Pennsylvania⁶ and

¹ *Sanford v. Jackson*, 10 Paige, 266.

² *Gordon v. Stevens*, 2 Hill, Ch. 46; *Brown v. Caldwell*, 1 Speers, Eq. 322; *Pickett v. Peay*, 2 Con. Court (Treadw.), 746; s. c. 3 Brev. 545; *Cunningham v. Shannon*, 4 Rich. Eq. 135; *Whilden v. Whilden*, Riley, Ch. 205; 1 Brev. Dig. p. 268, § 1. A devise by a husband to his wife of his whole estate, real and personal, during life or widowhood, does not, though accepted, bar the wife from demanding dower in lands aliened by him during the coverture. *Braxton v. Freeman*, 6 Rich. L. 35. So, where a testator left his widow "a provision in lieu and bar of all claim of dower, inheritance, or any other claim on her part," it was held that she was not excluded from a distributive share of real property purchased by the testator after making his will, and as to which he died intestate. *Hall v. Hall*, 2 M'Cord's Ch. 269, 299, 301.

³ *Tooke v. Hardeman*, 7 Geo. 20. Where a devise to the wife is made expressly in lieu of dower, she is required to elect whether she will take under the will or her dower in lands acquired after the making of the will. *Raines v. Corbin*, 24 Geo. 185.

⁴ *Lord v. Lord*, 23 Conn. 327; Stat. Conn. 1854, p. 383, § 20.

⁵ *Clarke v. Griffith*, 4 Iowa, 405; *Corriell v. Ham*, 2 Clarke, 552. The present statute of Iowa, provides that the widow's dower can not be affected by any will of her husband, if she object thereto, and relinquish all rights conferred upon her by the will. Rev. 1860, p. 416, § 2435. A devise to the widow does not bar her dower in lands sold on execution in the lifetime of her husband. *Corriell v. Ham*, 2 Clarke, 552.

⁶ *Kennedy v. Nedrow*, 1 Dall. 415; *Evans v. Webb*, 1 Yeates, 424; *Sample v. Sample*, 2 Yeates, 433; *McCullough v. Allen*, 3 Yeates, 10; *Duncan v. Duncan*, 2 Yeates, 302; *Hamilton v. Buckwalter*, 2 Yeates, 389; *Allen v. Allen*, 2 Penn. (Pen. & W.) 311; *Webb v. Evans*, 1 Binn. 565. See *Beall v. Schley*, 6 Penn. Law Jour. 549.

Indiana;¹ but now by statute in those States a testamentary provision by the husband for his wife is to be deemed and taken in lieu of her right under the law, in like manner as if so expressed, unless the contrary appear in the will.² The English doctrine is also adopted in Virginia.³ In *Higginbotham v. Cornwell*,⁴ it was said that in order to exclude dower, an intent so to do must be declared in express terms; or the conclusion from the provisions of the will should be as clear and satisfactory as if it were expressed; but in *Dixon v. McCue*,⁵ the judge delivering the opinion remarked that this was stating the doctrine somewhat too strongly. "A rule thus rigid," he added, "whilst it formed no necessary foundation for the judgment of the court in that case, would, in my opinion, come in conflict with decisions in numerous cases which have been too long and too generally recognized as precedents, to allow of dissent or doubt in respect to their authority now."

5. In Vermont, the widow is barred where the husband, by his will, has made provision for her which, in the opinion of the probate court, was intended to be in lieu of dower.⁶ And in New Hampshire⁷ and Rhode Island⁸ the widow is compelled to elect

¹ *Ostrander v. Spickard*, 8 Blackf. 227; *Kelly v. Stinson*, *Ibid.* 387; *Smith v. Baldwin*, 2 Carter, 404.

² Purdon's Dig. by Brightly, p. 362, § 4; p. 1017, § 12; 1 Rev. Stat. Ind. 1852, p. 255, § 41. The Pennsylvania Act of 1797, § 10, provided that an accepted devise of any portion of a testator's estate to his widow, should "be deemed and taken in lieu and bar of her dower out of the estate of her deceased husband, in like manner as if the same were so expressed." See *Reed v. Reed*, 9 Watts, 263; *Leinaweaver v. Stoever*, 1 W. & S. 160; *Gray v. McCune*, 23 Pa. St. 447; *Melizet's Appeal*, 5 Harris, 453; *McKeen's Appeal*, 42 Pa. St. 479; *Borland v. Nichols*, 12 Pa. St. 38, 42; *Bradford v. Kents*, 43 Pa. St. 474; *State Bk. v. Ewing*, 17 Ind. 68; *Piercy v. Piercy*, 19 Ind. 467.

³ *Higginbotham v. Cornwell*, 8 Gratt. 83; *Dixon v. McCue*, 14 Gratt. 540. See *Herbert v. Wren*, 7 Cranch, 370; *Blunt v. Gee*, 5 Call, 481; Act of Va. of Feb. 1, 1727, § 21, 4 Hen. 228; Act of 1785, 12 Hen. 145, § 21; *Ibid.* p. 165, § 6; Code Va. 1849, p. 474, § 4. It was held in *Wiseley v. Findlay*, 3 Rand. 361, that a gift of personality is no bar of dower in the realty. In *Higginbotham v. Cornwell*, *supra*, the widow was allowed to take under the will and also her dower in lands conveyed during the coverture.

⁴ *Higginbotham v. Cornwell*, *supra*.

⁵ *Dixon v. McCue*, *supra*.

⁶ Gen. Stat. Verm. p. 412, § 5. See *Smith v. Smith*, 20 Verm. 270.

⁷ N. H. Comp. Stat. 1853, p. 401, § 12. If a widow waive the provisions of her husband's will, she is entitled to her legal share in his estate, chargeable, however, with her proportion of any contingent liabilities to which the estate may be subject. *Copp v. Hersey*, 11 Foster, 317.

⁸ Rev. Stat. R. I. 1857, p. 506, § 21. A devise in lieu of dower bars that right in after-acquired lands. *Chapin v. Hill*, 1 R. I. 446.

between a devise to her by will and her rights under the law where it appears from the will that such devise was intended to be in lieu of dower.

6. Although the rule above discussed had its origin in the courts of equity, it seems now to be settled, at least in the United States, that a testamentary provision by the husband for the wife, will, if accepted by her, be a legal, as well as an equitable bar of dower in all cases in which it appears, either expressly, or by clear implication, to have been given in lieu of that right.¹ It was said by Thompson, J., in *Larrabee v. Van Alstyne*,² that to render a provision for the wife by will a legal bar of dower, it must consist of lands given or assured unto her for life; and that a sum of money, or other chattel interest, given by will in lieu of dower, will, if accepted, constitute only an equitable bar. But this distinction no longer prevails; and although many of the cases have been determined in equity, it is true, as was remarked by Lord Redesdale, in *Birmingham v. Kirwan*,³ that there is no difference in principle in the decisions of the courts of law and the courts of equity, in regard to this subject.⁴

Devise of lands in which the widow is entitled to dower.

7. It is settled, that a devise by a testator to his widow of a portion of the lands of which she is dowable, is not necessarily inconsistent with her claim to dower in the remainder. In *Lawrence v. Lawrence*,⁵ which is a leading case, the husband devised his manor of Little Sherrington, mansion-house, and lands of the annual value of 130*l.* to his wife *durante viduitate*; with remainder, together with all his other lands, to trustees for a term of twenty-four years from his death, with remainders over. The trusts of the term were for the payment of debts and legacies; and as a further provision for his wife, the testator directed that, after two years of the term were expired, his trustees should permit her to receive the rents of one of the farms of 60*l.* a year, and after five years of

¹ *Van Orden v. Van Orden*, 10 John. 30; *Jackson v. Churchill*, 7 Cow. 287; *Kennedy v. Mills*, 13 Wend. 553; *Bull v. Church*, 5 Hill, 206; s. c. 2 Denio, 430; *Davison v. Davison*, 3 Green (N. J.), 232; *Pickett v. Peay*, 2 Con. Court (Treadw.), 746; s. c. 3 Brev. 545.

² *Larrabee v. Van Alstyne*, 1 John. 307.

³ *Birmingham v. Kirwan*, 2 Sch. & Lef. 451.

⁴ *Kennedy v. Mills*, 13 Wend. 553, 555; 1 Lead. Eq. Cas. 319; 4 Kent, 57, 58.

⁵ *Lawrence v. Lawrence*, 2 Vern. 365; s. c. 3 Bro. P. C., 8vo. ed., 483.

the term were elapsed, to permit her to receive the rents of another of the farms of 90*l.* a year, for the remainder of the term, so long as she continued a widow. He then gave her several pecuniary and specific legacies, and appointed her sole executrix. No mention was made in the will, that any of the above provisions were to be in satisfaction of dower. The widow proved the will, possessed the personal estate, and entered upon the lands devised to her. She afterwards recovered her dower at law, of the yearly value of 86*l.*, and the lands were duly assigned. Upon a bill by the remainderman to be relieved against the judgment, Lord Somers was of opinion that the testamentary dispositions to the widow were intended in satisfaction of her dower, which intention appeared from the manner in which he had disposed of his lands not limited to his wife for life. This decree was reversed by Lord Keeper Wright, because, in his opinion, there was nothing in the will which showed a sufficiently clear intention that the widow was meant to be excluded from her dower. This judgment was acquiesced in till after the death of the plaintiff, when A. Lawrence, the next remainderman became entitled, who commenced his suit to be relieved against the judgment of dower, but Lord Cowper declined to alter, in that respect, Lord Keeper Wright's decree; upon which Lawrence appealed to the House of Lords, who confirmed Lord Cowper's decree, and consequently that of Lord Keeper Wright.

8. The reasons for the final judgment of the House of Lords appear to have been, that the devise to the widow of a part of the dowable estates, was consistent with her right to dower in the remainder, and that notwithstanding the interests which were given her in the two farms, parcels of the lands not devised to her; because her acceptance of them might not of necessity defeat any of the trusts of the term vested in the trustees, since the remainder of the lands, after the assignment of dower, might be sufficient to pay the debts and legacies in aid of the personalty; hence the implication, that the testator intended, by his testamentary dispositions to his widow, to purchase her right to dower in the lands not given to her, was doubtful and conjectural, which is not sufficient to put the widow to her election between her legal right and the testamentary benefit.

9. The preceding case was followed by *Lemon v. Lemon*.¹ There, the husband devised part of his lands to his wife for life, without expressing that they were to be in lieu of dower, and the residue

¹ *Lemon v. Lemon*, 8 Vin. Ab. Devise, p. 366, pl. 45.

of his estates to his brother in fee. The part devised to the wife exceeded the value of her dower. The widow recovered her dower at law, to be relieved against which, the testator's brother filed his bill, but the bill was dismissed; Lord Park, C., declaring that the point was already determined by the House of Lords.

10. Again, in *Hitchin v. Hitchin*,¹ Samuel Hitchin, the plaintiff's grandfather, made a mortgage for five hundred years, which was satisfied, and after his death assigned to Sarah, his widow, who was entitled to dower of his estate, and died, leaving Gyles, the plaintiff's father, his son and heir; who, being indebted, made his will and devised land to his wife, Sylvestra, but did not express it to be in satisfaction of dower, and gave the residue of his lands to his executors until his debts were paid. Sylvestra recovered dower at law, and 220*l.* damages; upon which, the heir filed his bill to be relieved against the judgment, and the widow also filed her bill for a discovery of the profits, and removal of the term out of the way. The lord keeper, in delivering judgment, said: "Sylvestra's bill is only against the trustees of the father to have an account of the real and personal estate, and to discharge the debts; you do not pretend but that a dowress is to be relieved against a satisfied mortgage, so she must in this case; you do not insist upon Lady Radnor's case to be against it. The heir must be relieved against the damages until the debts paid; let a master see whether sufficient was raised to pay the debts and defalcation out of the recovery; the devise is not to be looked upon as any recompense or bar of dower, but a voluntary gift."

11. In *Brown v. Parry*,² the testator died seized of lands of which the defendant, his widow, was dowable. By his will he devised to her some particular estates for life, and bequeathed to her some parts of his personal estate, but did not declare that the provision so made should be in bar of dower. The question was, whether, by accepting the devise and bequests under the will of her husband, she was not barred of her right to dower; and Lord Thurlow, C., held, that she clearly was not; for it was not her husband but the law that gave her dower; and what her husband gave her was in addition thereto.³

¹ *Hitchin v. Hitchin*, Prec. Ch. 133.

² *Brown v. Parry*, 2 Dick. 685.

³ See, also, *Strahan v. Sutton*, 3 Ves. Jr. 249; *Birmingham v. Kirwan*, 2 Sch. & Lef. 444; *Norcott v. Gordon*, 14 Sim. 258; *Lord Dorchester v. Earl of Effingham*, Coop. 319; and *Incedon v. Northcote*, 3 Atk. 433, in which the interest devised to the widow was reversionary.

12. Among the recent English cases which have occurred on this subject, is *Holdich v. Holdich*,¹ where a testator, after giving his wife an annuity of 50*l.*, gave her permission to reside in the house in which they then lived, and to have the use of the household goods and furniture for her life if she should continue his widow, and, subject thereto devised all his real and personal estate to his son in fee. Sir J. L. K. Bruce, V. C., held that the widow was not bound to elect, remarking that to put the wife to her election on the ground that her claim was inconsistent with the intention of the testator as to some other legatee or devisee, there must be something beyond the mere gift to the legatee or devisee. There must be such circumstances attending the gift as that, if dower were admitted, the legatee or devisee would be disappointed of the enjoyment of the property in the mode pointed out by the testator.²

13. Decisions to the same effect have been made in several of the American States.

14. In *Jackson v. Churchill*,³ a husband devised to his wife his dwelling-house and part of his garden, during her life or widowhood, together with a portion of his personal estate. His farm, and the residue of his personal property he divided between his two sons; one of them to keep his mother's stock, and the other to aid in her support, if she should request it. It was held that this was no bar of dower.

15. A testator, being seized of a dwelling-house and farm, and of other estate, both real and personal, gave a pecuniary legacy to his daughter, payable at twenty-one, or on her marriage; and gave to his wife the house and farm and his furniture for life, and one-third of his personal estate absolutely, and then concluded as follows: "And after the death of my wife, in case I should have no more children, I give, devise, and bequeath unto my said daughter, E. L., my said dwelling-house and farm, together with all the rest and residue of my personal and real estate." It was held by Walworth, Chancellor, that, taking the whole will together, it was fairly inferrible that the testator intended his widow should enjoy her dower in the real estate not specifically devised to her, as well as an equal third part of the personal estate.⁴

16. Where a testator devised all his real and personal estate to

¹ *Holdich v. Holdich*, 2 Y. & C. 18; acc. *Bending v. Bending*, 3 Kay & John. 257.

² 1 Roper, H. & W. 577; 1 Bright, H. & W. 548.

³ *Jackson v. Churchill*, 7 Cow. 287. ⁴ *Rathbone v. Dyckman*, 3 Paige, 9.

his executors and trustees, with directions to them to lay out certain portions of his lands into village lots, and to sell them from time to time as they might be wanted for building lots, and with power to sell any other parts of the estate they might deem necessary to fulfill the objects of his will, and gave to his widow the possession and direction of his dwelling-house and a particular farm, and an annuity of \$2,000, and a further annuity of \$500, to keep up the garden and improve the property, and also the use of his library and certain pleasure carriages, horses, &c.; it was determined that the widow was entitled to dower in the testator's real estate, in addition to the devises and bequests in her favor in the will.¹

17. In *Havens v. Havens*,² a testator devised to his wife for life, the house and lot where he resided, and gave to her various specific legacies to a considerable amount. A portion of his real estate he devised to his brother and sisters, and died intestate as to the remainder. It was held, that the provisions for the wife were not inconsistent with her claim of dower in the real estate devised to the brother and sisters, nor in that as to which the husband died intestate.

18. A testator, by his last will, directed that on his youngest child coming of age, one-third part of his estate should be set apart and invested for the use of his wife during her life, and at her death it was to be divided among her children. The residue of his estate he also directed to be divided among his children. The provision in favor of the widow was not declared to be in lieu of dower. It was decided, that she was not bound to elect between her dower and the provision made for her by the will, but was entitled to both.³

19. In *Kennedy v. Nedrow*,⁴ a testator devised to his wife certain lands in fee, his household goods and a large amount of other personal property, and 1,000*l.* in bonds and bills. He also gave her certain other lands in fee upon condition that she remained his widow. In the event that she contracted a second marriage her interest in the last mentioned premises was to be for life only, with power to devise the same to whomsoever she desired except to her second husband or any person deriving title under him. After

¹ *Fuller v. Yates*, 8 Paige, 325.

² *Havens v. Havens*, 1 Sandf. Ch. 324.

³ *Mills v. Mills*, 28 Barb. 454. See, also, *Stewart v. McMartin*, 5 Barb. 438.

⁴ *Kennedy v. Nedrow*, 1 Dall. 415.

making a number of other devises and bequests to various persons, chiefly to relatives, he directed that the residue of his estate should be divided among his wife and three sisters, share and share alike. It was nowhere expressed that the devises to the wife should be in lieu of dower, and the court held that no intention to that effect could be collected from the provisions of the will. "It must appear to be so intended by the words of the will," said the court, "and not inferred from its silence, or presumed upon conjecture. For no devise to a wife, even of an estate in fee simple, although ten times more valuable than her dower, will be, of itself, a bar of dower; but it will be considered as a benevolence, and she is entitled to both."

20. In *Kelly v. Stinson*,¹ a testator directed that his debts should be paid from the proceeds of his personal property, if sufficient, leaving the household furniture, and so much of the stock and farming utensils as might be required to carry on the farm; if the personal property should prove insufficient, he directed that so much of his lands as might be necessary should be sold for the payment of his debts, leaving to the last the lands on which he resided. He next provided that the remainder of his estate should be for the maintenance of his family and the schooling of his children. He directed that all his estate, after his children had attained their majority and the decease of his wife, should be equally divided among the former. He appointed his wife his executrix, and gave her power to sell and convey his lands, and to manage his estate as she saw proper for the maintenance and comfort of the family, so long as she remained his widow. In the event of her marriage or death he named an executor to act in her place. It was held that these provisions were not inconsistent with dower.

21. In *Clark v. Griffith*,² a testator devised to his wife for life, two hundred and forty acres of land and \$1,200 in money to build her a house, and all his household and kitchen furniture; and after other bequests, directed that at the death of his wife, the real estate devised to her should go to the minor heirs of J. D. It was held that there did not appear to be any such inconsistency between the widow's claim of dower and her right to the estate devised to her by the will, as should necessarily put her to an election between them.

¹ *Kelly v. Stinson*, 8 Blackf. 387.

² *Clark v. Griffith*, 4 Iowa, 405.

22. In *Brown v. Caldwell*,¹ a testator, in the first clause of his will, directed that the whole of his estate should be kept together for twelve months, and the proceeds applied to the payment of his debts. In the second clause he bequeathed as follows: "I devise that at the expiration of the above mentioned time, my wife shall have one negro man named Jim, and wife Sarah, with her entire issue; one negro woman Clarissa, child, and future issue; one negro boy Shade; the one-third of my household furniture, my carriage and horses, to be hers forever. I will that my boy Jesse remain with my other property for five years to come; then to be the property of my beloved wife forever; also my whole property in the Glenn's Springs, to be hers forever." In the third, fourth and fifth clauses, he gave to his three children each one-third part of his remaining property; and in the sixth clause directed that all his property, both real and personal, devised to his children, should be kept together until his eldest son arrived at the age of twenty-one; "then to be equally allotted and drawn for by my beloved children." These provisions in the will were held to be no bar to the wife's right of dower.

23. In *Cunningham v. Shannon*,² a testator devised his plantation and town house to his daughter for life, for her sole and separate use, with limitations, &c., and provided that his wife should be entitled for life, to use, occupy and cultivate four hundred acres of the plantation; to cut and haul from the plantation such firewood and timber for buildings or repairs as she might desire; and either to use and enjoy his town house, or to reside on his plantation, at her option. It was held that there was nothing in the provisions of the will excluding the wife from dower in the plantation, except in so much thereof as she elected to take under the will; and that she was bound to elect whether she would take the town house for life, or reside on the plantation.

24. A testator, in one clause of his will, devised property to his wife, and directed that "the provision herein made by me for my said wife shall be in lieu and bar, and in full satisfaction of, and for all dower and thirds, of, or in all or any part of my goods, chattels, lands, tenements, hereditaments, and whatever else she may in any manner claim and demand, of, in, or out of any of my estate, real and personal." To A., his son, the testator devised

¹ *Brown v. Caldwell*, 1 Speer's Eq. 322.

² *Cunningham v. Shannon*, 4 Rich. Eq. 135.

real estate for life, remainder to his children that should be living at his death; and in default of such children, declared that the property so given to his son should "revert to his estate," and devised the lands so reverting to his "own right heirs forever." A. died without issue. Held, that the widow, as one of the testator's right heirs, was entitled to a share of the property devised to A., and that she was not excluded by the provision made for her in the clause above stated.¹

25. It seems that the same principle applies where the devise is made by a third person. Thus, where lands descended to a son, subject to a right of dower in favor of his mother, and the son devised a part of the lands to his mother, and the residue to the defendant in the action, but omitted to make any declaration showing an intention to dispose of the whole estate, including the right of dower, or to require his mother to elect between her dower and the devise to her, and no such intention being deducible by clear and manifest implication from the provisions of the will, it was held that the presumption was that the testator intended only to devise to the defendant his own estate in the premises, subject to the right of dower therein.²

Devise of lands in trust for sale.

26. A devise of lands out of which the widow is dowable, upon a trust for sale, is not inconsistent with her claim to dower out of those lands, even though the interest of a part of the proceeds of the sale is given to her. Thus, in *Ellis v. Lewis*,³ a testator devised all his real estate to a trustee, upon trust for sale, with power to convey the same to purchasers without the concurrence of any person or persons beneficially claiming under his will; and he directed the trustee to stand possessed of the proceeds of such sale, together with the residue of his personal estate, upon trust to pay one moiety of the interest and dividends thereof to his wife during her widowhood, and the other moiety of such interest and dividends (and the whole after his wife's decease or second marriage) to his sister for her life, with remainder, as to the whole of the trust funds, to the children of the testator's sister for their lives and the life of the survivor; remainder over. It was held by Sir James Wigram, V. C.,

¹ *Seabrook v. Seabrook*, 10 Rich. Eq. 495.

² *Leonard v. Steele*, 4 Barb. 20.

³ *Ellis v. Lewis*, 3 Hare, 310.

that the widow was entitled to both her dower and the benefit given to her by the will. "I take the law," observed his honor, "to be clearly settled at this day, that a devise of lands *eo nomine*, upon trust for sale, or a devise of lands *eo nomine* to a devisee beneficially, does not, *per se*, express an intention to devise the lands otherwise than subject to its legal incidents, that of dower included. There must be something more in the will, something inconsistent with the enjoyment by the widow of her dower by metes and bounds, or the devise standing alone will be construed as I have stated. . . . If that be so, it is impossible, in the case of a devise of lands upon trusts for sale, that any direction for the application of the proceeds of such sale can affect the case. The devise is of land subject to dower. The trust to sell is a trust subject to dower; and the proceeds of the sale will represent the gross value of the estate, minus the value of the dower. Whatever direction, therefore, for the mere distribution of the proceeds the will may contain, that direction must leave the widow's right to dower untouched. . . . I found myself upon these two propositions: first, that a devise of land upon trusts for sale does not, *per se*, import an intention to pass the land otherwise than as subject to the legal incident of dower; and secondly, that the direction to divide the proceeds of the sale can not decide what the subject of sale is; and there is no circumstance affecting the proposition in its application to the present case."

27. The case of *French v. Davies*,¹ is a direct authority for the proposition above laid down. There, the testator devised to trustees (his wife being one of them) all his freehold estates to sell; with a direction that the proceeds were to form part of his residuary personal estate. He then gave to her leasehold premises, and a variety of articles of household goods, &c., and a legacy of 100*l.*, with liberty to reside in his mansion-house; and if she declined to do so, ordered it to be sold, and the money to be applied as the produce of his freehold estates. He also gave to his wife the interest of 2,000*l.* *durante viduitate*; but if she married, then half of the principal was to fall into his residuary personal estate, and the interest of the other half was to be paid to her separate use. The trustees were also to permit her the enjoyment, during widowhood, of his plate, &c., which were to be sold after her death or marriage, and the proceeds applied as the produce of his freehold and lease-

¹ *French v. Davies*, 2 Ves. Jr. 572.

hold estates. The testator then directed his trustees to place his residuary personal estate at interest, and to transfer one-eighth part of the capital to three of his adult children; and to apply the interest of the remainder for the support of his infant children till twenty-one or marriage; and then to transfer to them the capital. Benefit of survivorship was given among them, in the event of all of them, except one, dying before the residue could be ascertained, or their shares became payable; but if all of them died before the happening of either of those events, he gave the whole of his residuary estate to his wife and B. and C. absolutely, in equal shares. The principal question was, whether the widow could be compelled to elect between the benefits given to her by the will and her dower out of the freehold estate, which was sold with her consent. Lord Alvanley, M. R., determined that she was entitled to dower, and also to the provisions made for her by the will; being of opinion that none of the dispositions of the will raised an implication of clear intention in the testator to exclude his widow from dower. That her claim to dower did not disappoint any of the dispositions of the will, nor was it inconsistent with the testamentary benefits; and his lordship observed, with reference to the direction for the sale, as the wife consented to take the value of her dower out of the purchase-money, it would not have the effect of obstructing the sale any more than the incumbrance of any stranger; and in regard to the husband being ignorant of the wife's right to dower, that was not sufficient to put her to election; it must appear that he did know it and meant to bar her; so that what she demanded was repugnant to the provision.

28. In *Gibson v. Gibson*,¹ a testator gave all his freehold and leasehold messuages, tenements, &c., to trustees for all his estate and interest therein, in trust to sell and apply the proceeds in manner thereafter declared; he then gave certain legacies out of his personal estate; and the residue thereof, together with the proceeds to be derived from the sale of his freehold and leasehold estate he directed to be divided into four parts; one-fourth he gave to his wife, and the other three-fourths to certain other relatives. Among other legacies, sums of money were given in unequal amounts to his wife and the other devisees. The testator, after the date of his will, had leased parts of his estates for terms of

¹ *Gibson v. Gibson*, 17 Eng. Law & Eq. 349; 1 Drewry, 42.

years, with an option to the lessees to purchase, and had permitted one lessee to erect buildings, which had been done, and the estate was thereby greatly improved. It was held that the widow of the testator was not to be put to her election, but was entitled to dower, as well as to the benefits given her by the will.¹

29. This principle was applied by Walworth, Chancellor, to the case of *Wood v. Wood*.² There, a testator had devised all his estate, real and personal, to a trustee to be sold, and directed that after certain expenses were paid, the interest on one-third of the whole fund should be paid to the widow during her widowhood; and in case of her marriage, one-third of that third. The chancellor said: "Although the testator directs all his estate to be sold, and one-third of the proceeds to be invested for the use of his wife during her widowhood, it does not appear, by any necessary implication from the will itself, that he intended this provision to be in lieu of dower in the real estate of which he died seized. The widow, is not, therefore, obliged to elect between that provision and her dower. The question has frequently been discussed in the English court of chancery, how far, and when, a legacy or annuity to the wife, charged upon the real estate of the testator, is to be considered as a provision in lieu of dower, and there have been many conflicting decisions on the subject. I am satisfied, however, from an examination of the American as well as the English cases, that a devise of all the testator's real and personal estate to trustees, to be converted into money, without any particular designation of the real property to be sold, and giving to the widow an annuity or other provision out of such mixed fund, is not, of itself, sufficient to show that the testator intended that her interest in the land, as tenant in dower, should be sold as a part of the estate, so as to make it necessary for the widow to elect between such dower and the provision contained in the will. The widow in the present case is therefore entitled to both."³

30. But in the case of *Savage v. Burnham*,⁴ a provision made for a widow under a trust vesting the entire legal estate in the trustees, was declared to be inconsistent with a right of dower. In that case, the testator devised his estate, real and personal, upon these trusts: 1. To sell the real estate after the death of the widow; 2. That

¹ 1 Roper, H. & W. 586; 1 Bright, H. & W. 558.

² *Wood v. Wood*, 5 Paige, 596.

³ See, also, *Irving v. De Kay*, 9 Paige, 521.

⁴ *Savage v. Burnham*, 17 N. Y. 561.

she should, during her life, receive and take to her own use one-third part of the clear yearly rents and profits of the real estate; the residue of the rents and profits, until the sale of the real estate, to be deemed part of the personal estate and subject to the same dispositions; which were, 3. To apply the income to the maintenance and education of six sons and four daughters, named in the will, in equal shares, until the sons should attain the age of twenty-one years, and the daughters attain that age or be married respectively; 4. To pay or transfer the principal in equal shares to the sons and daughters, the shares of the sons to become vested at twenty-one, and then to be paid or transferred; the shares of the daughters to be vested in the trustees, the income to be paid to them after twenty-one or marriage, during life, and upon the death of each daughter leaving issue, her share to go to and vest in such issue.

31. In South Carolina, it has been decided, that a devise of lands to trustees to sell, or with directions to executors to sell, passes the estate subject to dower; and where a testator bequeathed to his wife all the property which he had obtained by her in marriage, and directed that his estate should be sold to pay his debts and provide for his children, it was held that the wife was entitled to dower, notwithstanding she had accepted the legacy, and that the sale of the land must be subject to that right.¹

Devise to widow of the entire estate.

32. The above cases relate principally to the obligation of the widow to elect between such of the lands as are devised to her by her husband and the dower in the residue of his estate; but they say nothing as to the question whether, when the whole of the lands are devised to her, she may take two-thirds of them as a purchaser under the will, and the remaining one-third under her title to dower. The principle, however, upon which these cases were decided, appears equally to apply to this subject. "There is no more inconsistency," Mr. Roper remarks, "between the widow's right to dower in the lands devised to her, and her interest in them under the devise, than in the above cases. The husband might intend that she should take no other interest in the lands bequeathed to her than under his will, or he might mean to pass to her his interest subject to her title to dower. His intention is dubious; which is

¹ Gordon v. Stevens, 2 Hill, Ch. 46.

not rendered more clear from any inconsistency between the concurrent enjoyment of her two rights, the one under the will, and the other by the provision of the law. For want, therefore, of this clear implication of intention from the contents of the will, that the testator intended what he had given to his widow should be held and enjoyed under his will and by no other title, it would seem that she may, in general, elect to take the lands devised to her both under the will and her title to endowment. This may be of great advantage to her when her husband dies in embarrassed circumstances; for, as to one-third of the estate she would enjoy it under a paramount title free from his incumbrances during the marriage; and for the other two-thirds she would be liable to contribute with the owners of the remainder of the lands, in discharge of the incumbrances.”¹

33. Cases have arisen in the United States involving a practical application of the foregoing doctrine. Thus, in *Church v. Bull*,² a testator devised all his real and personal estate to his wife, during her life, or so long as she should remain his widow; and after her death, or remarriage, he gave all his property, except some small legacies which were bequeathed to his daughters, to his three sons. But he did not state in his will, that he intended this provision for his wife to be in lieu of her dower in his real estate after the determination of such provision, by her remarriage. The wife, having survived her husband, entered and occupied under the will for several years, and then married a second husband. It was held that she was entitled to dower. “No question of dower could arise while she continued a widow,” said the chancellor, “as she was entitled to the possession of the whole during that time. And the subsequent devise of his whole real estate to his three sons is not necessarily inconsistent with an intention on the part of the testator, that his wife should be left to her legal right of dower alone for her support, after the particular estate which had been devised to her had been determined by her marriage. . . . *Primâ facie*, the devise of the testator’s whole real estate to his three sons after that time, did not, *per se* express an intention to devise such real estate otherwise than subject to its legal incidents, one of which legal incidents was the widow’s common law right of dower therein.”

¹ 1 Roper, H. & W. 582.

² *Church v. Bull*, 2 Denio, 430; s. c. 5 Hill, 206.

34. The question again came up in *Lewis v. Smith*,¹ where it was explicitly determined that a devise of the testator's whole estate to his widow for life, with remainders over, is not a provision in lieu of dower, unless such intention be implied from other terms of the will; and that the widow may take one-third of the estate as dowress and the residue as devisee. The lands devised were subject to a mortgage executed by the husband alone during the coverture. "There is no person who takes an interest under the will during her lifetime," observed Denio, J., "with which the claim of dower will conflict; and as to herself there is no incongruity in her taking one-third of the unsold land as dowress, and two-thirds as devisee. The former she will hold by a title paramount to the mortgage, and the other is subject to that incumbrance. The mortgagee, it is true, may be disappointed in finding his lien less extensive than that which the instrument professed to confer on him, but that consequence does not arise out of the will, but from an act not testamentary, and by which the wife can not be affected."²

35. In *Sanford v. Jackson*,³ a testator devised all his property, real and personal, to his wife and two other persons, to be kept for her use and support so long as she should continue his widow, and until his youngest child should become of age, and then directed that all his property should be equally divided among his children. The wife survived the testator and contracted a second marriage. It was decided that the devise in her favor was not inconsistent with her claim of dower in the testator's real estate after his youngest child arrived at the age of twenty-one, and that her acceptance of the devise did not bar her right.

36. In a case determined in Pennsylvania, a testator devised to his wife, during her widowhood, the front room in his farm-house, a cellar, and the common use of the kitchen, oven, and draw-well. He also gave her, in consideration of her schooling and well educating the children, the profits of his farm until his sons came of age to possess it. He then ordered his farm to be divided into two parts, one of which he gave to one son, reserving a privilege of water for the part which he gave to another son, upon their respectively coming of age; and directed one of the sons to keep a horse and cow for the wife, and to cut and lay firewood at her door during

¹ *Lewis v. Smith*, 5 Seld. 502; s. c. 11 Barb. 152; 9 Leg. Obs. 292.

² See *Corriell v. Ham*, 2 Clarke (Iowa), 552.

³ *Sanford v. Jackson*, 10 Paige, 266.

her widowhood. It was held that the devises to the latter were not in lieu of dower.¹

37. There is, however, a conflict in the authorities upon this subject, some of the courts holding that a devise to the wife during widowhood, or during life, is an implied exclusion of dower in the same lands, upon the ground that the two estates can not exist together; especially if coupled with a direction that upon her remarriage, all her interest in the testator's estate shall cease.² In *Stark v. Hunton*,³ the will of the testator directed that all debts and expenses should be paid out of the personal estate and such real estate as was for that purpose designated in the will. Then followed this devise: "I give, devise and bequeath unto my wife Jane, all my tavern house and lot where I now live, together with all the furniture and stock in the same; to have and to hold to my said wife Jane, during her natural life, provided she remains my widow; but in case she should marry again, then it is my will that my said tavern house and lot and furniture be disposed of according to law." "I think," remarked the chancellor, "the manifest intention of the testator was, that the devise to the wife should be in lieu of her dower, at least in the premises thus devised. He never intended that she should hold one-third part of this tavern house as dowress, and the remaining two-thirds as devisee. It was one property, not susceptible of convenient division. The devise was of the whole, and the object was one entire object, the benefit of his wife and children. Some of the cases have been liberal in support of the widow's claim for dower; but I do not find one that goes so far as to maintain that where certain property is given to a wife during her widowhood, that she is also entitled to claim dower out of that same property. The two claims are inconsistent, and can not stand together."⁴

38. In *Caston v. Caston*,⁵ a testator devised his plantation and a number of negroes to his wife during her widowhood, charging the

¹ *Webb v. Evans*, 1 Binn. 565, 1 Yeates, 424. See, also, *McCullough v. Allen*, 3 Yeates, 10; *Chappel v. Avery*, 6 Conn. 31; *Wood v. Wood*, 5 Paige, 596; ante, § 31.

² 1 Lead. Eq. Cas. 319. As to the rule prevailing where an estate is giving during widowhood expressly in lieu of dower, see post, §§ 73-83.

³ *Stark v. Hunton*, Saxton, 216.

⁴ See this case commented on by Walworth, Chancellor, in *Sanford v. Jackson*, 10 Paige, 266, 272-3.

⁵ *Caston v. Caston*, 2 Rich. Eq. 1.

same with the payment of his debts and the support of his minor children. The wife occupied and enjoyed the property for eleven years, and then filed her bill claiming dower in the plantation. It was held that she could not take the plantation under the will, and claim dower in it also, and that her conduct sufficiently indicated her election to take under the will.

39. In *Wilson v. Hayne*,¹ a testator bequeathed property to his wife during her life, or so long as she remained his widow, with remainders over at her death. The will further provided, that in the event of a second marriage, the estate given to the wife should "devolve upon the persons mentioned in the said will, as if she, my said wife, had departed this life; my will being that she shall have no interest whatever in my estate after her second marriage." This was held to be a sufficient implication of an intent to exclude the wife from her dower.

40. In *Hamilton v. Buckwalter*,² it was determined that a devise to a wife of lands during widowhood is a bar of dower, though not so expressed. "It appears," said the court, "that all the testator's lands in Lampeter township were devised to the widow during her natural life, or widowhood; and the rest of his lands were devised to Robert Patton, the eldest son, for six years. The devises are entirely inconsistent with the claim of dower. The widow could not hold the lands in Lampeter township under the will, and the eldest son hold the residue of the lands, while she held in dower the one-third part of both tracts at common law." So in *Creacraft v. Dille*,³ it was held that a devise by the husband of one-third of his personal estate to his wife, and the use of one-third of his lands while she remained his widow, and also one cow, over and above her thirds; and all the rest of his estate to his

¹ *Wilson v. Hayne*, 1 Cheves, Eq. 2d part, 37.

² *Hamilton v. Buckwalter*, 2 Yeates, 389.

³ *Creacraft v. Dille*, 3 Yeates, 79; s. c. Addison, 350. Chancellor Walworth has the following observations upon the cases cited in this section: "The case of *Creacraft and Wife v. Dille* appears to have been decided upon the equitable principle of an agreement between the testator and his wife, that she should accept the provision in the will in full satisfaction of her dower. In *Hamilton v. Buckwalter*, the decision was against the widow upon the ground that the will expressly provided that in case of her second marriage she should *leave* the plantation in Lampeter township, which was devised to her for life, or during her widowhood, on receiving a certain pecuniary compensation; which provision for leaving the lands the court considered as wholly inconsistent with a claim to retain one-third of the plantation for her dower." *Sanford v. Jackson*, 10 Paige, 266, 273.

children, would bar the widow of her dower on the acceptance of the devise.

Interests in futuro devised to the widow.

41. If the interest devised to the widow in the estate be not *in præsenti*, but *in futuro*, she may enjoy that interest consistently with her dower; and there arises no clear implication of an intention from the devise of such an interest, that the testator meant to exclude her immediate title to dower. The result, therefore, is, that a sufficient case will not be made to put the widow to elect between her present title to dower in the lands and her future interest in the same under the will.

42. Thus, in *Incedon v. Northcote*,¹ the wife was entitled to a portion of 5,000*l.*, charged upon her father's property, which her husband extinguished, and made no settlement upon her. Of the estates of which he died seized, his widow was only entitled to dower out of one called the Northcote estate. By his will, he devised his real and personal estates to trustees, in trust as to particular parts of them for his wife for life, and in trust as to his residuary personal estate and his real estates to pay his debts, and then to raise 5,000*l.* for children's portions; and as to his real estates, to the use of his first and other son and sons successively in tail, remainder to the use of his daughters, with remainder to the use of his wife for life. The testator added a codicil to his will, which formed no ingredient in the court's judgment upon the widow's claim to dower in the Northcote estate. To this claim of the widow it was objected that the devises in the will clashed and were inconsistent with it; because the husband gave to her the very estate in remainder out of which she demanded dower, so that she ought to take either totally under the will, or totally to reject it. But Lord Hardwicke said that nothing was given to her by the will except a specific legacy of personal estate, and a remainder for life in her husband's real estate, in default of issue male and female by himself. And he was of opinion, that there was no such inconsistency between the widow's title to dower and the dispositions made by the will, as to lay her under the necessity of electing between her legal right and the remainder devised to her in the

¹ *Incedon v. Northcote*, 3 Atk. 430.

same estate of which she claimed dower, or the other benefits given to her by the will.¹

Devise of rent or annuity charged upon lands of which the widow is dowable.

43. To the cases upon this division of the subject the same principles must be applied as have been before stated. In order to oblige the widow to elect between the rent or annuity devised to or in trust for her and her dower of the lands charged with it, a clear implication must arise from the will and the provisions contained in it on the ground of inconsistency between them and the title to dower, that the latter was intended to be purchased by the former, and that the benefits under the will were meant to be the only interests which the widow should have or be entitled to in the premises.

44. A mere gift to trustees of the dowable estate does not of itself raise the implication that the dower of the wife was intended to be barred,² and it is conceived that a devise of an annuity or rent charge to her out of the dowable estate, whether secured or not by an express clause of entry and distress, will not have that effect, since it does not, as is presumed, manifest a clear implication of the testator's intention that the widow should take no other interest in the lands charged than that given by the will; for there is no inconsistency between the enjoyment under the devise and the assignment of dower. The widow may have her dower assigned of one-third of the estate, and receive her annuity or rent charge out of the remainder.³ It is no objection to say that the rent charge or annuity and the remedies provided for payment of it were given and secured out of the whole of the estate, which the widow defeats by having her dower of a third of the lands assigned to her, and thence to raise an implication that it was not intended she should have both; because the husband might be, or he is supposed to be, acquainted with his wife's title to dower affecting his estate, and he may have meant, in charging it with the annuity or rent charge, to have done so subject to his wife's title to dower, *i. e.*, to charge the interest which he had in the property to the extent only of such interest, leaving his widow's title to dower untouched. Hence

¹ 1 Roper, H. & W. 585; 1 Bright, H. & W. 557.

² Ante, §§ 26-31.

³ 1 Bro. C. C. 292.

it appears that the implication of intention to exclude the right to dower, by the grant to the widow of an annuity or rent charge out of the dowable estate, is at least equivocal; it does not amount to that clear and certain manifestation of intention which we have seen to be necessary to oblige the wife to elect between the provision under her husband's will and her dower.

45. Upon the same reasoning, if, after the devise of an annuity to the widow out of the dowable lands, the testator expressly bequeath them to A. by the terms "all my estate subject to the charge aforesaid," still the widow will not, as it would seem, be obliged to elect between her dower and the annuity, because the intention of the testator to exclude dower still remains dubious, since by the words "all my estate," he may only intend to pass to A. such interest as he has the power to dispose of, *i. e.*, subject to the widow's title to dower; and then the subsequent devise of the lands, subject to the annuity, referring to such interest, raises no implication of clear intention from inconsistency between the right to dower and the limitation of the estate, as to render it necessary to oblige the widow to elect between her annuity and dower.¹

46. In *Pitts v. Snowden*,² the husband devised to his widow an annuity of 50*l.*, payable out of his freehold and copyhold estates, to be made good out of his personal property; and subject to the annuity he devised the premises to his children, &c. For securing such annuity, powers of entry and distress were given; and Lord Hardwicke decided that the widow was entitled to both her dower and the annuity.

47. In this case it is observable that the annuity did not issue out of the dowable estate alone, but out of a mixed fund consisting of copyhold and freehold property; a circumstance relied upon in some of the cases after mentioned. Hence, the implication that the annuity was intended in lieu of the widow's claim upon only one of the funds charged, was weakened, since an inference arose from that circumstance, that the widow, having no such claim upon the copyhold as she had upon the freehold estate, and both being equally charged with the annuity, the testator, in making such grant and charge upon both of them, intended the annuity as a bounty to her, and not as a condition to her giving up any right

¹ See 2 Ves. Jr. 580; and Sir William Grant's observations in *Chalmers v. Storil*, 2 Ves. & Bea. 222.

² *Pitts v. Snowden*, 1 Bro. C. C. 292, note.

or claim upon one fund, viz., his freehold estate. It is, however, presumed, for the reasons stated previously to the introduction of the case, that if the charge of the annuity had been confined to the freehold property, the widow would have been entitled to both the annuity and her dower, and that no case of election would have been raised.

48. The case which followed was that of *Arnold v. Kempstead*,¹ before Lord Northington. There, the husband bequeathed to his wife two leasehold houses for life, and also an annuity of 10*l.* *durante viduitate*, out of rents of freehold estates in which she was entitled to dower. Subject to the annuity, he devised the freehold property to A. for life, remainder to B. in fee. There were not any clauses of entry and distress for the arrears of the annuity. The question was, whether the widow was entitled to dower and also to the annuity, or was obliged to elect between them. And it was decreed that she ought to elect, upon the ground that it was the manifest intention of the testator to give her the annuity in satisfaction of dower, and that the latter claim was in contradiction to the will.

49. The case of *Pitts v. Snowden* does not appear to have been cited in *Arnold v. Kempstead*. Between the two cases these differences may be remarked, that in the latter the annuity is given solely out of the dowable estate, and without any powers of entry or distress. But how the annuity in the case of *Arnold v. Kempstead* contradicts the will more than the annuity in *Pitts v. Snowden*, it is difficult to discover. With respect to the testator's intention, it may be observed, that in granting the annuity out of the freehold estate, he might mean no more than to charge such estate to the extent of his interest therein, viz., subject to the widow's right to dower of one-third part of it, and then all inconsistency between the two claims is obviated. At least it is presumed that there is not in this case that clear and certain implication of the testator's intention to purchase his wife's title to dower by the grant of the annuity, as is required by the cases to oblige her to elect between her interest under her husband's will and her legal right to dower.

50. The next case is *Villa Real v. Lord Galway*, before Lord Camden, fully reported in a note to *Brown's Chancery Cases*.²

¹ *Arnold v. Kempstead*, 2 Eden, 236; Ambl. 466.

² 1 Bro. C. C. 292.

The husband devised to his wife an annuity of 200*l.*, for life, and subject thereto he gave all his real estates, and also his personal estate, to trustees, to preserve contingent uses of the real, and for those purposes to make entries; but to permit his daughter, or her trustee, during her life, to receive the rents of all the premises for her benefit, and to let the same at the best rents, without fines, with remainder to the heirs of her body, &c. Powers of entry and distress were given to recover the arrears of the annuity. The question was, whether the widow was entitled to dower and also to the rent charge, or was bound to make an election; and Lord Camden was of opinion, under all the circumstances, that she ought to elect.

51. It must be noticed that the above case is no authority for the proposition that a mere devise to the widow of a rent charge issuing out of the lands in which she is dowable, raises a sufficiently clear implication that her husband (the testator) intended that she should be put to elect between such rent and her dower; so that it does not sanction the case of *Arnold v. Kempstead*, nor is it contrary to Lord Hardwicke's decision in *Pitts v. Snowden*; but it coincides with the decree of Lord Redesdale in *Birmingham v. Kirwan*.¹ The present case was determined upon the particular circumstances. The lands were devised to trustees, and two obligations were imposed upon them, viz., to permit the daughter, or her trustee, to receive the rents of all the lands during her life, and also to demise the whole estate at the best rent. If, then, dower had been assigned to the widow in one-third of the estate, the trustees could neither permit the daughter nor her trustee to receive the rents of all the estate, nor let the whole of it; their lessee could not enjoy the whole of the premises under their demise, as was directed by the will. These circumstances were abundantly sufficient to raise a clear and unequivocal implication, from the inconsistency between the rent charge issuing out of the dowable lands, the claim to dower by metes and bounds, and the limitations contained in the will. That such were the true grounds upon which Lord Camden decided the case, was the opinion of Lord Redesdale in the before-mentioned case of *Birmingham v. Kirwan*;² "for," said his lordship, "my recollection of the manner in which *Villa Real v. Lord Galway* has always been treated, is, that the

¹ Cited post, § 91.

² *Birmingham v. Kirwan*, 2 Sch. & Lef. 453; post, § 91.

claim of the annuity was utterly inconsistent with the claim of dower; that the directions in the will with respect to the management of the whole estate, the payment of the annuity, and the accumulation during the minority of the child, were inconsistent with setting out a third part of the estate by metes and bounds, and therefore Lord Camden thought the implication manifest, that the testator did intend the annuity as a provision in bar of dower."

52. The case of *Villa Real v. Lord Galway* was followed by *Jones v. Collier*,¹ before Sir Thomas Sewell, Master of the Rolls, in which the husband bequeathed to his wife, for life, his dwelling-house in C., household goods, &c., and charged all his freehold estates at C. with an annuity of 40*l.* to be paid quarterly to his wife for life, with power to distrain for the arrears. He also charged the estate with a like annuity for his nephew B., with a similar power of distress; and he then devised the premises given to his wife for life, from her death, and also all his freehold estates so chargeable as aforesaid, and all other his real and personal estates, to trustees, until his grand-niece D. attained the age of twenty-five, and then to her absolutely. He directed his trustees to allow and apply the surplus of the rents and profits of his said estates, subject as aforesaid, for D.'s maintenance and education until she attained her above age. He then directed his trustees to complete a contract he had entered into for the sale of part of his estate, and to lay out the money to the same uses which he had limited of the lands by his will. Under these circumstances, Sir Thomas Sewell decided that the widow should elect between the benefits in the will and her dower.

53. "It appears from the report," Mr. Roper observes,² "that the foundation of this decree, was an intention implied from the direction of the surplus rents, subject to the annuities, to be applied for the maintenance of D., and from the inference that when the testator entered into the contract for sale of part of his estate, he conceived that he had power to sell it free from dower. But these reasons do not appear to be satisfactory; for the supposed inconsistency between dower and the direction as to the surplus rents must be removed if the testator be considered (as he *primâ facie* ought) to pass no other interest in the estates to D. than he had power to dispose of, and then the term 'surplus rents' will con-

¹ *Jones v. Collier*, Ambl. 730.

² 1 Roper, H. & W. 594.

sistently refer and apply, not to the whole, but to the two-thirds of the estates of which he had the power of disposition; so that this direction and disposition, and the assignment of dower by metes and bounds are consistent with each other, and do not raise that clear and unequivocal implication of intention in the testator, that his widow should forego her legal right for the interests given to her by the will.¹ And with respect to the inference to be drawn from his entering into a contract for the sale of part of his estate, that is also ambiguous, for he might not have had his wife's title to dower in contemplation, and therefore no intention to deprive her of it, and he might have intended to have sold the lands subject to dower, or the widow might have concurred in the sale upon having part of the purchase-money paid to, or settled upon her in compensation of her legal right.² The case therefore seems to be one of the weakest in which the widow was put to election, and it is presumed that a similar case, occurring at present, would not receive the same determination."

54. The next case which occurred on this subject, was *Pearson v. Pearson*.³ There, the husband devised a house and ten acres of land to his son, subject to a rent charge of 10*l.* a year to his wife, for life, and of 5*l.* a year to his brother. Question, whether the widow was entitled to the annuity and also to her dower? Lord Rosslyn decided that she was entitled to both, upon the principle that there appeared to be no inconsistency between the right to dower and the rent charge, or the dispositions in the will. He considered, however, that if the estate were insufficient to satisfy the annuities and dower, such circumstance would be sufficient to raise the necessary implication that the widow was not intended to have the provision in the will and her dower, and an inquiry was directed to ascertain the fact. This is the first case in which such an inquiry was directed; and in *French v. Davies*,⁴ the master of the rolls said that although Lord Thurlow thought that he would not have made such a reference, yet he was unwilling to assent to that; he admitted, with his lordship, that nothing was so dangerous as to construe a will by extrinsic circumstances, unless it were so clear as to exclude all doubt, but that the doctrine of election was much more an argument of conscience than anything else; it would therefore be unconscientious in the widow to claim both under the will, and also her

¹ 3 Bro. C. C. 347.

² 2 Ves. Jr. 577.

³ *Pearson v. Pearson*, 1 Bro. C. C. 292.

⁴ *French v. Davies*, 2 Ves. Jr. 580.

dower, if there was an irresistible presumption that it was against the testator's intention; for which reason, it seems, his honor presumed that cases of election were exceptions to the general rule, that no inquiries ought to be directed, nor evidence permitted, to lay a foundation for determining contrary to what appeared on the face of the will. His conception upon this subject appears to have been confirmed by Lord Eldon in *Druce v. Denison*,¹ who there determined, after mature consideration, that evidence in a sense parol, viz., a statement of property in the testator's handwriting, and his books of account, were evidence admissible to show that under a devise of his real and personal estate he intended to pass property not strictly his own, viz., personal estate which belonged to his wife.

55. The next case that occurred was *Wake v. Wake*.² There, the husband devised all his estate and effects upon trust (subject to an annuity or rent charge of 35*l* to his wife, for life) for his son by a former wife, whom he made residuary legatee. Upon the question of the widow's election, Buller, J., sitting for the chancellor, decreed that she was not entitled to both her annuity and dower. The point does not appear to have been much considered, and the case was decided upon the authority of *Jones v. Collier*, before stated;³ but neither *Pitts v. Snowden*, nor *Pearson v. Pearson*, was mentioned. This case, therefore, being but little, if at all argued, and being determined by a judge not very conversant with the rules of courts of equity, it is presumed that it can not be produced to shake the decisions in the two former cases of *Pitts v. Snowden*, and *Pearson v. Pearson*.⁴

56. This decision was followed by *Foster v. Cook*,⁵ which is expressive of Lord Thurlow's opinion upon the propriety of the judgment given in *Wake v. Wake*. The husband being seized of freehold messuages, &c., and possessed of leasehold and other personal property, devised to trustees all his real and personal estates, upon trust to pay his wife an annuity of 50*l*. *durante viduitate*; but if she married to pay an annuity of 30*l*. only. The trustees were to permit her to have the use of his mansion-house and the furniture, at her election, while single; and he directed that the child with which his wife was *enciente* should be brought up by her until

¹ *Druce v. Denison*, 6 Ves. Jr. 385.

² *Wake v. Wake*, 1 Ves. Jr. 335; 3 Bro. C. C. 255.

³ *Ante*, § 52.

⁴ 1 Roper, H. & W. 596-7.

⁵ *Foster v. Cook*, 3 Bro. C. C. 347.

the age of twelve years; and that the trustees should improve and manage his real and personal estates in the best manner for such child, and its support and maintenance. He then gave to the child, when arriving at the age of twenty-five years, all his real and personal estates, charged with the payment of the widow's annuity; and he directed his trustees with all convenient speed to possess themselves of all his estates and substance, and to improve the same for the benefit of his child. It was one of the questions in the cause, whether the widow was entitled to her dower and the annuity; and Lord Thurlow was of opinion that she was entitled to both.

57. Mr. Roper, commenting upon this decision, says:¹ "The above case resembles in its circumstances some of the authorities before stated. The annuity in it is charged upon a mixed fund, as in *Pitts v. Snowden*, and it supports the decisions in that and the case of *Pearson v. Pearson*; it is also quite consistent with the case of *Villa Real v. Lord Galway*, although in some particulars resembling it. In both, the devises were to trustees to receive the rents and manage the estates for the benefit of the devisees; but here the concordance ceases; for in the present case there was no direction that the trustees should demise the premises, as in *Villa Real v. Lord Galway*; so that Lord Camden, for the reasons before stated in the consideration of that case, considered the implication clear and satisfactory, that the widow could not have been intended to take her dower in contradiction to the will. But in *Foster v. Cook*, there is no such inconsistency; for under the presumption that the testator only meant to dispose of the interest which he had in his real estates, *i. e.* the inheritance subject to his widow's title to dower, all his testamentary dispositions may take effect, although the widow have her dower assigned by metes and bounds."

58. The next case was *Greatorex v. Cary*.² The bequest by the husband was of 150*l.* a year to his widow *durante viduitate*, which he ordered his executors to pay half yearly out of his real and personal estates; and he directed his personalty to be placed out at interest to assist his real estate in the payment of the annuity, or so much at least of his personal estate as should be necessary for that purpose; and he desired the first payment of the annuity to be made in six months after his death. He then gave to his widow his household furniture, &c., and in the event of her dying

¹ 1 Roper, H. & W. 598.

² *Greatorex v. Cary*, 6 Ves. Jr. 615.

without leaving a child, he devised to his sister his residuary real and personal estates. Upon the widow's claim of her annuity and dower, Lord Alvanley determined, on the authority of the last case, and the principle before stated, that she was entitled to both of them.

59. In *Roadley v. Dixon*,¹ the testator, after bequeathing to his wife an annuity charged on his estate at S., with power of entry and distress, devised his real and personal estate to trustees upon trust to pay such sum of money to his son as they should think fit; and he directed them to occupy and manage during the minority of his son, a farm constituting the greater part of his estate at S., and to let and manage the residue of his real estates, and to receive the rents of the whole of his real estates. Lord Lyndhurst, C., thought that, considering the particular disposition which the testator had made of his property, the charge of the annuity, the clause of entry and distress, the express direction for the occupation of part of the estate by the trustees, the trust declared with respect to the rents of the whole of the real estate, showed his manifest intention that the whole of his property should be free from dower.

60. This case was followed by *Dowson v. Bell*,² where a testator devised all the rents of his copyhold lands to be applied to the maintenance of his children, until the youngest attained twenty-one, subject to an annuity to his wife so long as she should continue his widow; and upon his youngest child attaining twenty-one, he devised all his copyhold lands among his children equally; and he devised all his freehold tithes and lands upon the same trusts, subject to the annuity; and he bequeathed the use of his household furniture to his wife so long as she should continue his widow. It was held that the widow was entitled to both the annuity and the other benefits given by the will and her dower. A like decision was made in *Harrison v. Harrison*,³ of which the circumstances were nearly similar.

61. A late case upon this subject is *Lowes v. Lowes*,⁴ where a power given by the testator to his trustees to continue any farming concern in which he should be engaged at the time of his decease, and to let or sell the premises, was held to put the widow to her election.

¹ *Roadley v. Dixon*, 3 Russ. 192.

² *Dowson v. Bell*, 1 Keen, 761.

³ *Harrison v. Harrison*, 1 Keen, 765.

⁴ *Lowes v. Lowes*, 5 Hare, 501; 10 Jurist, 453.

62. In the recent case of *Holdich v. Holdich*,¹ Sir J. L. Knight Bruce, V. C., observes: "I feel bound by the present state of the authorities to say, that a mere gift of an annuity to the testator's widow, although charged on all the testator's property, is not sufficient to put her to her election. I consider myself equally bound by the authorities to say, that a mere gift to the widow of an annuity so charged, and a gift of the whole of the testator's real estate, though specified by name, to some other person, are not together, of themselves sufficient to put the widow to her election."

63. In *Warbuton v. Warbuton*,² a testator seized of lands of which his wife was dowable, gave all his real and personal estate to trustees upon trust, out of the income to pay his wife 20*l.* a year, and gave his trustees a power of leasing over his real estate. The provision made for the widow was small, as compared with the whole income. It was decided that she could not be required to elect between her dower and the provisions contained in the will, but was entitled to both. It was further held, that where a testator, seized of real estate of which his wife is dowable, makes a provision for his wife by will, and gives a power of leasing his real estate to trustees, such power is a strong circumstance in favor of his intention to put his wife to her election between such provision and her dower; but is not conclusive on the question; and, notwithstanding such power, she may be entitled to both.³

64. Mr. Roper, after a review of most of the preceding cases, draws the conclusion, taking into consideration the bias of courts of equity in favor of the widow's claims, that whether an annuity or rent charge be given to her out of the particular estate in which she is entitled to dower, or out of that estate enumerated among other property, she will be entitled to both provisions, unless in the first case the estate is insufficient to pay the annuity and to answer her dower, from which circumstance the intention would be apparent that her husband did not mean that she should be at liberty to enforce both her claims; and unless, in the second case, upon a consideration of the whole will, such an inconsistency appears between the provisions and limitations in it and the right to dower, as to make the intention manifest and indubitable, that she was

¹ *Holdich v. Holdich*, 2 You. & C. 18.

² *Warbuton v. Warbuton*, 23 Eng. Law & Eq. 415; 23 Law J. Rep. N. S. Chanc. 467; 18 Jurist, 415; 2 Sm. & Gif. 163.

³ Overruled as to the last point. See post, § 89.

not to have the benefits intended for her by the will together with her dower.¹

65. The principle established by the foregoing authorities was applied by Chancellor Kent to the case of *Adsit v. Adsit*.² There, a testator gave to his wife five hundred dollars, "to be left in the hands of his executors, to be paid to her for her support, at any time, or at all times, as her need might require." He also gave to her what household goods she might need; and to his children he bequeathed certain pecuniary legacies to be paid after the sale of his farm; after the payment of all debts and legacies, he directed the residue to be distributed equally among his children and grandchildren. His movables and farm he ordered to be sold, the money to be paid to the legatees, as the executors might think proper. "The bequest of a sum of money to the wife," said the chancellor, "is never admitted to be, of itself, and unconnected with other circumstances, a substitute for dower. It is considered a voluntary gift, and does not affect her legal rights. Every devise or bequest imports bounty, and does not naturally imply satisfaction of a pre-existing incumbrance. But there is one expression in the will which may seem to mark a design in the testator to give the five hundred dollars in lieu of dower, and that is, the declaration that it was to be paid to her *for her support*. If this contains sufficient evidence of a clear, unambiguous intention in the testator to substitute that legacy for the dower, then the defendant ought to be put to her election; for if she takes a benefit under the will, she must conform to it in all respects, as far as she is able. It would be unconscientious in the wife to take the dower and also what the testator intended to be in lieu of it. The great point here is, does the gift of five hundred dollars furnish clear and undoubted evidence of such intention? May not this sum have been intended as auxiliary support, and not as an entire and only provision for her maintenance? It was a provision far inferior in value to her dower. It was a very inadequate support for her during life. The sum is not given absolutely out and out, but is to be *left in the hands of the executors*, and to be paid to her *as her need might require*. The better opinion is, that it was intended as a mere gratuity, or as a cumulative provision, and created for greater caution. A well rooted and anxious affection would naturally have

¹ 1 Roper, H. & W. 588-599; 1 Bright, H. & W. 560-572.

² *Adsit v. Adsit*, 2 John. Ch. 448.

made this small pecuniary provision for the better comfort of an aged wife, without any intention of depriving her of her more ample and valuable common law resource. The fact that the testator gives her also the requisite household goods, shows that he contemplated her ability, and perhaps desire, to live by herself. 'I can not find, in this bequest, evidence sufficient to satisfy my mind of a certain or manifest intention that it should be in lieu of dower; and the acceptance of it is not inconsistent with the claim of dower, nor is the assertion of that claim repugnant to, or destructive of, any provision in the will.'

66. In *Smith v. Kniskern*,¹ a testator, possessed of a large real and personal estate, bequeathed to his wife his household furniture, two negroes, and "her comfortable support and maintenance out of his estate, to be, from time to time rendered and paid to her by his executors, and the use of one room in his dwelling-house during all such time as she should continue to be his widow, and no longer." After a legacy to a grand-daughter, he devised the rest of his estate equally between his two daughters. It was held, that although the charge of a "comfortable support and maintenance" might fall upon the real as well as the personal estate, it did not affect the widow's right of dower; there being no express declaration on the subject by the testator, nor anything inconsistent in the two claims, and that, therefore, the widow was not to be put to her election.

67. It will be observed that in the foregoing case, the provision for the maintenance of the wife was payable out of both the real estate and the personalty; but it is held that where such a provision is payable out of the real estate alone, it is a bar of dower.² Thus, in *White v. White*,³ the testator directed that his wife should have one room in his dwelling-house, "and a comfortable maintenance out of his real estate, during her natural life, or widowhood;" and then devised his real estate to his two sons. It was decided that the maintenance was intended to be in lieu of dower. "If the demandant shall be allowed to recover dower in the real estate," said Ford, J., "it will disturb and prevent the testator's own provisions from being carried into effect. He has provided for her a comfortable maintenance, and has made it a charge upon his whole real estate, so that it goes with the estate as a burden into the

¹ *Smith v. Kniskern*, 4 John. Ch. 9.

² See ante, §§ 43-64.

³ *White v. White*, 1 Harr. 202.

hands of his two sons; they are to furnish the maintenance, and in consideration of it they are to have the *whole* estate. Now, if the widow takes one-third of it for her dower, and they obtain only two-thirds of it during her lifetime, it wholly deranges the testator's settlement, which was that they should have the whole estate, and be liable in respect of it for her maintenance. The will can never be executed according to his intent, for the sons will have only two-thirds of what the testator intended; and the settlement for the widow would be only two-thirds of the maintenance provided and intended for her. The testator's settlement would be broken up, and some other would have to be substituted in the place of it. Either the widow must lose her whole maintenance, or it must be apportioned on the sons according to the proportional part of the lands they obtain."

68. In *Duncan v. Duncan*,¹ a testator directed that all his estate both real and personal, should be sold to the best advantage, as soon as convenient, and gave his wife the interest of one-third part of the price of his real estate, when sold, for her support during her natural life. It was held that this provision was inconsistent with dower. The court said: "Though the devise to the widow is not expressed to be in lieu and satisfaction of dower, yet it is absolutely inconsistent with and repugnant to such claim. She could not possibly have the interest of one-third of the amount of *sales* of the *whole* land during her life, and at the same time hold one-third part of it *unsold* for her benefit."²

Bequest of personal interest.

69. When a pecuniary legacy, personal annuity, or other interest merely affecting the personal assets is bequeathed by the husband to his widow, without a declaration that it is intended in satisfaction of dower, no implication whatever arises that the disposition was made with that view or intent, and she will be entitled to both.³

¹ *Duncan v. Duncan*, 2 Yeates, 302.

² See *Snyder v. Warbasse*, 3 Stockt. Ch. 463; *Bray v. Lamb*, 2 Dev. Eq. 372.

³ 1 Roper, H. & W. 577; 1 Bright, H. & W. 548; *Strahan v. Sutton*, 3 Ves. Jr. 249; *Ayres v. Willis*, 1 Ves. Sen. 230; *Adsit v. Adsit*, 2 John. Ch. 448; *Van Arsdale v. Van Arsdale*, 2 Dutch. 404; *Wiseley v. Findlay*, 3 Rand. 361; *Shaw v. Shaw*, 2 Dana, 341; *Timberlake v. Parish*, 5 Dana, 345; *Hall v. Hall*, 8 Rich. L. 407; *Whilden v. Whilden*, Riley, Ch. 205; *Guignard v. Mayrant*, 4 Desaus. 614; *Fulton v. Fulton*, 30 Missis. 586; *Ostrander v. Spickard*, 8 Blackf. 227; *United States v. Dun-*

70. A testator bequeathed to his wife certain articles of personalty, and "all the rest of the property she brought when I married her;" and he directed that the rest of his estate, real and personal, should be sold, and the proceeds equally divided among his children. It was held that the provision for the wife was not in lieu of dower.¹

71. A testator bequeathed one thousand dollars to his wife, to be paid as soon as the money could be collected. He directed his whole estate, real and personal, to be sold, and the money to be laid out in bank stock for the support of his children until the youngest child arrived at the age of twenty-one years, or married; and then that the money should be equally divided among all his children, or their children, should they die before the period above named. These provisions were regarded as not inconsistent with the wife's claim of dower.²

72. In Delaware, it has been held that a direction to executors to set apart \$3000 out of the testator's "estate," the interest of which sum was to be annually paid to the widow, is not such a devise of real estate to the widow as will bar her dower, though the will also directed a sale of both real and personal estate.³ So a bequest of personal property to the wife, with a direction that the real estate shall be sold, and a fee simple title conveyed, being of equal "tenor" with that by which the testator held the same, is not such a devise as will put the widow to her election.⁴

Devise during widowhood.

73. The question as to the effect of devises during widowhood, in lieu of dower, has been frequently discussed by the courts; and it may be stated as the result of the adjudged cases upon that subject, that a devise so limited, whether of real or personal estate, will, if accepted, operate as a bar of dower; and that the interest given by the testator will cease upon the termination of the widowhood by a subsequent marriage.

can, 4 McLean, 99; Jennings v. Smith, 29 Ill. 116; Chandler v. Woodward, 3 Harring. 428; Kinsey v. Woodward, Ibid. 459. And see 3 & 4 Will. IV. ch. 105, § 10; ante, vol. 1., Appendix.

¹ Hall v. Hall, 1 Rich. L. 407.

² Whilden v. Whilden, Riley, Ch. 205.

³ Chandler v. Woodward, 3 Harring. 428.

⁴ Kinsey v. Woodward, 3 Harring. 459.

74. It has been held in a number of cases, that a devise *durante viduitate* is so far inconsistent with the enjoyment of dower in the estate devised, as of itself to furnish evidence of an intention to exclude that right.¹ These cases have already been referred to.² In some of them the point was directly determined that all right in the estate of the testator is lost by a second marriage.³ Other adjudications have been made, holding that a gift during widowhood does not necessarily compel an election by the widow, nor prevent her from claiming dower.⁴ But it is not intimated in any of these decisions, that if a devise during widowhood be made in lieu of dower, whether expressly or by implication, the widow can, after contracting a second marriage, claim her dower under the law.

75. A distinction is taken between a conditional limitation during widowhood and a condition subsequent in restraint of marriage attached to a bequest of personalty; and it is said that in a case of the latter description, the condition will be without effect, unless coupled with a specific limitation over in the event of a breach. Thus, in *Parsons v. Winslow*,⁵ a testator bequeathed thirty thousand dollars to trustees "for the sole use of his wife during her widowhood and life," and then, after giving directions for the investment of the legacy and the payment of the interest to the wife, went on to provide, that the trust which he had raised should "cease with the widowhood of his wife, and expire at her death, and the money bequeathed to her use, in whatever form it might then be, should go to his son." This was construed to be a bequest upon condition subsequent, without limitation over, and held not to be defeated by the marriage of the widow.⁶ "The principles established upon this subject by the English authorities," said Sedgwick, J., "to which our opinion in this case conforms, are plain and intelligible. It is a general rule that a condition annexed to a devise or bequest for

¹ *Stark v. Hunton*, Saxton, 216; *Caston v. Caston*, 2 Rich. Eq. 1; *Wilson v. Hayne*, 1 Cheves' Eq., 2d part, 37; *Hamilton v. Buckwalter*, 2 Yeates, 389; *Creacraft v. Dille*, 3 Yeates, 79; s. c. Addison, 350.

² Ante, §§ 37-40.

³ *Stark v. Hunton*, Saxton, 216; *Hamilton v. Buckwalter*, 2 Yeates, 389.

⁴ *Sanford v. Jackson*, 10 Paige, 266; ante, § 35; *Church v. Bull*, 2 Denio, 430; s. c. 5 Hill, 206; ante, § 33; *Lewis v. Smith*, 5 Seld. 502; ante § 34; *Webb v. Evans*, 1 Binn. 565; ante, § 36; *Lasher v. Lasher*, 13 Barb. 106.

⁵ *Parsons v. Winslow*, 6 Mass. 169. The Ch. Justice did not sit in the case, and Sewall, J., dissented.

⁶ See observations upon this case in 2 Lead. Eq. Cas. pt. 1, p. 298.

life whereby it is to be divested by the marriage of the devisee or legatee, is to be considered as intended merely *in terrorem*, and it is therefore void. To this rule there is an exception, that such condition shall be effectual, if the subject of the devise or bequest be given over, so as to *create* an interest in another person. And again, this exception is restrained and limited. To give it effect, the giving over to a third person must be an express giving over of the *particular* devise or legacy, unincorporated with any other subject; and it must also be immediate to take effect at the time of the marriage. Neither of these circumstances attends the bequest under consideration. It was not an *express* bequest of the *particular* legacy, nor was it to have an immediate effect."

76. The principle above discussed was applied to the cases of *M'Ilvaine v. Gethen*,¹ and *Hoopes v. Dundas*.² In the last named case a testator bequeathed to his executors an annuity to be paid to the widow of his deceased son during the term of her natural life, if she so long remained a widow and unmarried; and there was a general devise over of the residue of his estate. It was held, the court following the decision of *M'Ilvaine v. Gethen*, that this was not a conditional limitation, but a bequest on condition in restraint of marriage, and that the bequest was absolute and the condition void. It was further determined, in both cases, that a general residuary bequest will not convert a specific or pecuniary bequest on condition, into a conditional limitation, and that to produce this result, the bequest must be given over specifically on the breach of the condition.³

77. In *Bennett v. Robinson*,⁴ the provision in question was in the following terms: "I allow my wife one-third of the profits arising off of my real estate, only so long as she remains my widow." This was held to be a devise of one-third of the land itself, and strictly a conditional limitation marking the extent of the interest given, and determinable by the subsequent marriage of the widow, without entry by the heir, or devise over. The validity of a restraint on the marriage of a widow, was again held in the case of *Commonwealth v. Stauffer*,⁵ where it was also decided, that such a

¹ *M'Ilvaine v. Gethen*, 3 Whart. 375.

² *Hoopes v. Dundas*, 10 Barr, 75. See, also, *Lloyd v. Lloyd*, 2 Sim. N. S. 255; s. c. 10 Eng. Law & Eq. 139.

³ 2 Lead. Eq. Cas. pt. 1, pp. 297-8.

⁴ *Bennett v. Robinson*, 10 Watts, 348.

⁵ *Commonwealth v. Stauffer*, 10 Barr, 350.

restraint is equally effectual in the case of realty, whether put in the form of a conditional limitation, or of a condition subsequent; the difference in this respect between real and personal estate being, that the heir is entitled to enforce a breach of condition in the case of realty, but not of personalty.¹ "A mistaken notion has been entertained," said Gibson, Ch. J., who delivered the opinion of the court, "that a restraint of marriage, to be valid in a devise of land, must not be general; but that would bring such a devise to the level of a bequest of chattels, and abolish the distinction between legacies and devises altogether. Yet the notion has received color from the very same text-writers, who, in 2 Powell on Dev. 291, and 1 Jarman on Wills, 843, have asserted that, even in regard to devises of land, it seems to be generally admitted (by whom?) that unqualified restrictions on marriage are void, on grounds of public policy; though the point rests, they say, rather on principle than decision. I know of no policy on which such a point could be rested, except the policy which, for the sake of a division of labor, would make one man maintain the children begotten by another. It would be extremely difficult to say, why a husband should not be at liberty to leave a homestead to his wife, without being compelled to let her share it with a successor to his bed, and to use it as a nest to hatch a brood of strangers to his blood. Such is not the policy of the statute of wills, which allows a man to devise his land 'at his own free will and pleasure;' nor is it the policy of the common law, which allows him to give his property on his own terms, or not at all; and if he might not do the one, he would assuredly do the other; so that it is not easy to see how the cause of population would be promoted by binding his hands. To throw the widow of a landless merchant on her dower at the common law would not do it. It may be the present policy of the country to encourage reproduction—though the time will certainly come when excess of population will be a terrific evil here, as it is elsewhere—but no political regulation, which looks no further than inducements to second marriage, will either advance or retard it."

78. In *Dixon v. Ramage*,² it was held that a devise "to my wife Mary and son Jonathan, share and share alike, so long as she remains my widow," charged with the performance of certain duties and payment of money by the son, created in him but an estate

¹ 2 Lead. Eq. Cas. pt. 1, p. 298.

² *Dixon v. Ramage*, 2 Watts & Serg. 142.

during the widowhood of his mother, although there was no other disposition of the estate by the will. So where a testator charged upon a part of his real estate devised to his son, the sum of fifteen hundred dollars, the interest of which he directed should be paid to his widow during her widowhood, and the bequest was sanctioned by the heirs and the widow, by an agreement executed after the death of the testator, it was held, that upon the marriage of the widow, the fifteen hundred dollars was recoverable from the devisee by the executors for distribution under the will.¹

79. In *Taylor v. Birmingham*,² a testator devised lands to his wife for her support during widowhood, and in the event of her death or marriage, to any child or children of his born of her; and in case of her death or marriage, leaving no heir by him, then he devised the estate to his nephew in fee. Before the death of the testator, his wife bore him a daughter, who died shortly after her father, and the widow conveyed the lands, and afterwards contracted a second marriage. It was held, 1. That the widow having forfeited her estate by a voluntary breach of the condition upon which she held it, it went to the remainder-man designated in the will. 2. That having taken under the will the portion therein given to her, it was in *lieu* of dower, and her right to dower could not be restored by a voluntary breach of her tenure.

80. In *Irvine v. Sibbetts*,³ a testator devised as follows: "I give unto my beloved wife Nancy, during her lifetime or widowhood, all my estate, real and personal, to be by her applied toward raising and schooling my children; and at her decease, the remainder, if any, to be divided according to the laws of this commonwealth, share and share alike; and in case she should see cause to marry, she is to have only her bed and bedding and an equal share with the children that may then be living, out of my estate." It was determined that the devise gave the widow the whole estate during her widowhood, and upon her subsequent marriage, an equal share with the children in fee simple. It was further decided, that upon her marriage, her interest in the estate, except her equal share with the children, determined by the limitation contained in the devise, without entry or claim by those who had the next expectant interest.

¹ *Fahs v. Fahs*, 6 Watts, 213.

² *Taylor v. Birmingham*, 29 Pa. St. (5 Casey), 306.

³ *Irvine v. Sibbetts*, 26 Pa. St. 477.

81. In *Chappel v. Avery*,¹ a testator devised to his wife the use of one-third part of his home farm during her widowhood, and in a subsequent clause, the use of all his estate, both real and personal, until his children (a son and daughter) should become of age; and then devised to his son two-thirds of his home farm, and provided that he should have the whole of his landed property after the marriage or decease of his mother. It was held, that on the marriage of the mother, before either of the children arrived at full age, her right ceased, and the title of the son became perfect, to the real estate devised. In *Phillips v. Medbury*,² the same principle was recognized and applied. Referring to the power of courts of equity to declare restraints upon marriage in wills void, as made *in terrorem*, the court remarked: "It is admitted that this power is not given by the common law; nor is it ever exercised in relation to real estate, but only as to personal estate, which is, in the case of legacies, subject to the control of a court of chancery. Nor is it applied to a widow. It would seem very reasonable, that a man leaving a widow with seven children, as in the present case, should be permitted to encourage her, by suitable provision in his will, to remain single, and not subject his own offspring to the probable evils of a stepfather, to waste her substance, and thereby render her less able to support and educate them. Indeed, it entirely accords with reason, as it appears to me, that she should have an option to take such provision and remain unmarried, or refuse it, and be thrown upon the general provision of law,—her dower."

82. Decisions to the same effect have been made in other States.³ "The devise to the wife during her widowhood," said the court in *Vance v. Campbell*,⁴ "should not be construed as a condition in restraint of marriage, but should be deemed only an allowable limitation to the estate devised. The marriage, *ipso facto*, terminated the devisee's right to any portion of the estate as derived from the will. And as she had not renounced the provision made

¹ *Chappel v. Avery*, 6 Conn. 31.

² *Phillips v. Medbury*, 7 Conn. 568.

³ *Delay v. Vinal*, 1 Met. 57; *Craig v. Walthall*, 14 Gratt. 518; *Vance v. Campbell*, 1 Dana, 229; *Pringle v. Dunkley*, 4 Smedes & Marsh. 16; *Stevenson v. Brown*, 3 Green, Ch. 503; *Van Orden v. Van Orden*, 10 John. 30; *Wibkie v. Meir*, Superior Court Cincinnati, General Term, Feb. 1865; *Paine v. Gupton*, 11 Humph. 402. See *Blunt v. Gee*, 5 Call, 481. In *Davison v. Wolf*, 9 Ohio, 73, the question whether a second marriage terminated the estate held under the will, was left undecided.

⁴ *Vance v. Campbell*, 1 Dana, 229.

for her by the will, but had elected to hold under the will, she can not be entitled to any part of the estate by operation of law, and contrary to the provisions of the will. Having elected to hold under the will, and having so held until after the time allowed for renunciation had expired, she can not now be permitted to assert a right against the will, or independently of it. As, therefore, she terminated her interest as devisee by her second marriage, she can have no right now to any portion of the testator's estate which was devised."

83. The point was also directly ruled by Vice Chancellor Kindersley, in the recent English case of *Lloyd v. Lloyd*.¹ "The law recognizes in the husband," said the vice chancellor, "that species of interest in the widowhood of his wife as makes it lawful for him to restrain a second marriage—that is to say, that the provision which he has made shall cease. I have no doubt, also, that, with respect to either his wife, or a stranger, a testator may give an annuity, to continue so long as she remains single and unmarried; but as to a person not a wife, if he first gives her a life or other estate, and then appends a condition to defeat that estate if she marries, that would not be good."²

Provisions inconsistent with dower.

84. The terms of the devise to the widow, although not amounting to expression, may raise a sufficiently clear implication of the testator's meaning, that the bequest to her of part of his lands should be in satisfaction of her dower in the remainder of them.³ In such cases she will be obliged to elect between the devise to her and her legal title.

85. The provisions which have generally been held inconsistent with the widow's legal right to dower, are those which prescribe to the devisees a certain mode of enjoyment which shows the testator's intention that they should have the entirety of the property. Thus, in *Miall v. Brain*,⁴ the testator devised his real and personal property

¹ *Lloyd v. Lloyd*, 2 Simons, N. S. 255, 42 Eng. Ch. 254; s. c. 10 Eng. Law & Eq. 139; 16 Jurist, 306. To the same effect is *Boynton v. Boynton*, 1 Bro. C. C. 445; post, § 96.

² 10 Eng. Law & Eq. 143. See, also, 2 Lead. Eq. Cas. pt. 1, 280, *et seq.*; 1 Jarman on Wills, 836, *et seq.*

³ See some of these cases referred to, ante, §§ 48, 50, 52, 54, 55, 59, 61, 67, 68.

⁴ *Miall v. Brain*, 4 Madd. 119.

to trustees, upon trust to permit his daughter to use and occupy a freehold house, part of his property, for her life, and upon other trusts, partly for the benefit of his wife. Sir J. Leach, V. C., observed, that the testator contemplated for his daughter the personal use and occupation of that house, which was inconsistent with the widow's claim to dower out of that part of the property. The house was a part of a general devise, and the testator had not given it to the trustees free from dower, unless he had so given the rest of the estate. The testator had shown a plain intention, that the trustees should take such an interest in the house as would exclude the wife's dower, and the same intention must apply to the whole estate passing by the same devise.

86. So in *Butcher v. Kemp*,¹ the testator having devised a freehold farm to trustees for the benefit of his daughter, with directions to them to carry on the business of the farm, or let it on lease, during the daughter's minority, Sir J. Leach, V. C., held this to be sufficient proof of an intention to exclude the wife from dower.

87. The case of *Hall v. Hill*,² was decided upon the same grounds. There, a testator devised his real and personal estate to a trustee upon trust to permit his wife to take an annuity of 200*l.*, with powers of entry and distress, and devised to his wife a farm for life, with power to devise the same. The testator, by a codicil, changed his trustee, and gave the new trustee power to raise money for payment of his debts and legacies by sale of his estates, and gave him a power to lease for thirty-one years in possession. Sir E. Sugden, C., remarked that he could understand that a charge of debts would not be inconsistent with dower, but that he could not understand how they could lease an estate in possession subject to a right of dower on the very estate the possession of which was to be given, and held that there was sufficient proof of an intention to exclude the wife from dower.

88. So in the case of *O'Hara v. Chaine*,³ where a testator, having contracted to sell part of his fee simple estates, devised all his real and personal estates to trustees, and directed them to complete his contract with the purchasers, and to sell and convert into money all his real and personal estate, and out of the interest from the moneys to arise from the sales to pay an annuity to his wife for

¹ *Butcher v. Kemp*, 5 Madd. 61.

² *Hall v. Hill*, 1 Con. & Law. 120; 1 Dru. & War. 94.

³ *O'Hara v. Chaine*, 1 Jones & Lat. 662.

her life, and he empowered his trustees to lease such parts of his real estate as should not be sold, it was held by Sir E. Sugden, C., that the widow was bound to elect.

89. In *Parker v. Sowerby*,¹ a testator bequeathed his personal estate and an annuity to his wife, and devised his real estate to trustees, with power to "let" and cut timber. It was held that the widow was put to her election between the bequests and her dower. "I have no doubt whatever," said the lord chancellor, "upon this case. I do not think that Mr. Swanston correctly states the rule of law upon this subject, when he says that, to raise a case of election against the wife, it must be apparent upon the face of the will that the testator had present to his mind the right of his wife to dower, and showed an intention that she should not have it. It must be apparent upon the will that his intention is to dispose of his property in a manner which is inconsistent with the right to dower. The two cases of *Hall v. Hill* and *O'Hara v. Chainé*,² before Lord St. Leonards, when in Ireland, followed as they have been by two or three other cases in this country, appear to me to have laid hold of a distinction extremely reasonable. Supposing even all the cases that have been decided against the election right, still, I think this distinction a very intelligible one—I mean the existence of the power to lease given to the trustees, which, as Lord St. Leonards said, must mean a power to lease the whole; it can not mean a power to lease that part which might not be given by metes and bounds to the widow. If it were necessary to find any additional reason for holding that this is a case for election, it would be afforded by the circumstance which was pointed out by Mr. Murray—I mean the express power to the trustees to cut timber upon any part of the estate; this would be wholly inconsistent with the right to dower."³

90. Where a testator appeared to have intended that a person other than his widow should at a certain time become "possessed of or entitled to" certain lands belonging to him, although his widow might be then living, it was held that his widow was bound to elect between her free-bench and the benefit given by the will.⁴

¹ *Parker v. Sowerby*, 27 Eng. Law & Eq. 154; s. c. 1 Drew. 488; 4 De G. M. & G. 321; acc. *Pepper v. Dixon*, 17 Sim. 200. See ante, § 63.

² Ante, §§ 87, 88.

³ See s. c. decided by the vice chancellor, 21 Eng. Law & Eq. Rep. 39; 17 Jur. 752.

⁴ *Taylor v. Taylor*, 1 Y. & C. 727.

91. In the case of *Birmingham v. Kirwan*,¹ the husband, being seized in fee of considerable estates, devised them to trustees in trust, by sale or mortgage, or out of the rents and profits, to pay debts, &c., in aid of his personal property; and as to his demesne of about seventy acres, with his house, offices, and garden, to permit his wife to hold and enjoy them for her life at the yearly rent of thirteen shillings for each acre of the demesne, exclusive of bog, she keeping the house, offices and garden, in perfect repair, and not to let them, except to the persons in remainder. The residue of his lands, subject to the payment of his debts and legacies as aforesaid, he devised to other persons. The testator was greatly indebted at his death to creditors by *elegit*, who took possession of the lands not devised to the widow. She also entered upon the demesne, house, &c., bequeathed to her for life; and afterwards recovered her dower at law out of the residue of the lands. The question was, whether, under the circumstances, she was entitled to any dower, and of what? And Lord Redesdale decided, in conformity to *Lawrence v. Lawrence*,² and the other cases of that class before referred to,³ that, the devise of part of the lands to the widow did not bar her right to dower in the remainder of them. But he was of opinion that, under the terms of the devise, and the dispositions in the will, she could not claim dower in the house and demesne and also the interest in them given to her by the will, since the enjoyment under the two titles was inconsistent under the circumstances of the case; 1st, because the rent of thirteen shillings per acre was issuable out of the whole house and demesne, which could not be if the widow were entitled to endowment out of them; 2dly, because she was to keep the premises in repair, and not to alien them except to the persons in remainder; directions which applied to the whole of the estate devised to her, but quite incompatible with the right of a person claiming title by dower, a title paramount to them in one-third of the estate; 3dly, since if the widow brought a writ of dower against the trustees as devisees, in respect of the house and demesne, and was to have a third part set out to her, they could not execute the trust reposed in them of permitting her to enjoy the whole under the will, one-third being recovered against them; 4thly, because the trustees could not, in

¹ *Birmingham v. Kirwan*, 2 Sch. & Lef. 444. To the same effect, Lord Dorchester *v. Earl of Effingham*, Coop. C. C. 319. See *Bending v. Bending*, 3 Kay & John. 257.

² *Ante*, § 7.

³ *Ante*, §§ 7-25.

the event last supposed, reserve an acreable rent on the whole, and of the rent to be reserved she could not have dower; 5thly, for since the widow must admit the right of the trustees to the whole house and demesne, for the purpose of having the demise made to her under the will, her title to dower would involve this contradiction, that she must dispute their title as to one-third of the whole; and lastly, because if the widow had entered upon the whole house and demesne under a lease from the trustees before bringing her writ of dower, she must have demanded dower against her own title, and avoided the lease as to one-third. Under all these circumstances his lordship considered the implication clear, that the husband intended his wife should enjoy the whole of the house and demesne under a right created by the will, and not parts of them under a right which she had previously to it, and the remainder under the will.

92. It has been decided in several English cases, that a devise of property to the widow and others in equal shares, is evidence of an intention to exclude the widow from her dower. An instance of this occurred in *Chalmers v. Storil*,¹ in which case the words of the will were, "I give to my dear wife A. and my two children B. and C. all my estates whatsoever, to be equally divided amongst them, whether real or personal." The property of the testator consisted of real and personal estates, which were enumerated by him as consisting of freehold ground rents, money on mortgage, American bank stock, an estate in America, &c.; in the event of his wife surviving his children he gave their shares to her for life. One of the questions was, whether the widow was entitled to dower out of the remainder of the real estates not immediately devised to her. And Sir William Grant, Master of the Rolls, determined she was not. "The testator," he observed, "directing all his real and personal estate to be equally divided, the same equality is intended to take place in the division of the real as of the personal estate, which can not be if the widow first takes out of it her dower, and then a third of the remaining two-thirds. Farther, by describing his English estates, he excludes the ambiguity which Lord Thurlow, in *Foster v. Cook*,² imputes to the words 'my estate,' as not necessarily extending to the wife's dower." "This case," Mr. Roper remarks,³ "seems to be an authority, that if the husband devise

¹ *Chalmers v. Storil*, 2 Ves. & Bea. 222.

² *Foster v. Cook*, 3 Bro. C. C. 347.

³ 1 Roper, H. & W. 580.

his freehold estates to his widow and other persons as tenants in common, without expressing that his wife's share should be in lieu or satisfaction of her dower, she must elect between the devise to her and her legal title." This principle has been applied to other cases.

93. In *Dickson v. Robinson*,¹ the testator gave his real and personal estate to his wife in trust for the equal benefit of herself and her two daughters. Sir Thomas Plumer, M. R., said that he could not distinguish the case from *Chalmers v. Storil*. "The substance of the will," he added, "is, that there should be an equal division of the property, which can not take place if the widow is to have a third. The real and personal estate are united together; the personal estate is not subject to any antecedent claim; and is not the real estate intended to be given in the same manner? The principle certainly is, that the court will go as far as it can, not to exclude the claim to dower; but here it would be inconsistent with the will."

94. In *Roberts v. Smith*,² the testator, after giving his wife an estate in fee and certain legacies, devised gavelkind lands, and all other his property of whatever nature or kind soever, to his wife and two other persons, in trust as to one moiety, for the maintenance of herself and her children by a former marriage, and as to the other moiety, for his children. Sir J. Leach, V. C., held that the widow was put to her election. "The principle," said his honor, "referred to in *Chalmers v. Storil*, decides this case. The plain intention of the testator was, that the wife should have half the income of his property for the maintenance of herself and her children by her former husband, and that the other half of the income should be applied to the maintenance and education of the testator's own children. That intended equality would be disappointed, if the wife were, in the first place, to take her dower."³

95. "Although, however," says a recent English writer, "*Chalmers v. Storil* has been so often recognized and followed as an authority, it scarcely seems to have been decided upon correct principles; because, when a person devises 'all his estates' to his widow and children, 'equally to be divided among them,' he, according to the ordinary rules of construction, would be held to devise only what belonged to him, viz., the estate, subject to the

¹ *Dickson v. Robinson*, Jac. 503.

² *Roberts v. Smith*, 1 Sim. & Stu. 513.

³ See, also, *Reynolds v. Torin*, 1 Russ. 129.

widow's right to dower; and an equal division of the estate after the assignment of the widow's dower by metes and bounds, would fully satisfy the words of the will."¹

96. The case of *Boynton v. Boynton*² furnishes an example of a middle case between expression short of direct affirmation that the provision should be in bar of dower, and when nothing is mentioned on the subject. There, the husband, after giving to his wife, for life, his mansion-house, &c., and some legacies, devised to her an annuity of 1000*l.*, charged upon his real estates not bequeathed to her, and in lieu of dower; but this grant and the legacies were declared to be void if she married again, and in that event he gave her an annuity of 100*l.*, similarly charged, "in full of every benefit and advantage which he meant should arise out of any of his real or personal estates, in case she should marry again." The widow, in answer to a suit, elected to take her dower, and afterwards married; upon which a supplemental bill was filed, and she claimed, by her answer, both her dower and the annuity of 100*l.*, notwithstanding her prior election; but Lord Thurlow said, that the terms in which that annuity was given, were tantamount to an express declaration that she should not have dower, and that having married again, and elected to take her dower, she had no title to the annuity of 100*l.*, and he decreed accordingly.³

97. In the old case of *Gosling v. Warburton*,⁴ the husband devised his land to his wife, till P., his daughter, attained the age of nineteen years, and afterwards to P. in tail, remainder over in fee. He further directed that P. should pay, after her age of nineteen years, to his wife 12*l.* per annum in recompense of her dower; and, if she failed of payment, that his wife should have the land for her life. Before P. attained nineteen, the wife brought her writ of dower, and recovered a third part; and after P. reached that age, entered for the nonpayment of the 12*l.* The question was, whether such entry was lawful; and it was adjudged not; for, having recovered a third part in dower, she should not have the rent by the will; it being against the intention of the testator that she should have both. The judgment was affirmed upon appeal.

98. If a man devise his real estate from his heir, after giving

¹ 1 Lead. Cas. in Eq. 300. See 1 Jarman on Dev. 402; *Ellis v. Lewis*, 3 Hare, 315; *Carroll v. Carroll*, 20 Texas, 731.

² *Boynton v. Boynton*, 1 Bro. C. C. 445.

³ 1 Roper, H. & W. 580-584; 1 Bright, H. & W. 552-557, 572.

⁴ *Gosling v. Warburton*, Cro. Eliz. 128.

his widow a provision in lieu of dower, and the devisee die in the lifetime of the testator, the heir will take the estate, but the widow will be obliged to elect.¹

99. The American reports contain a number of cases in which testamentary dispositions in favor of the wife were of such character as induced the courts to regard them as inconsistent with her claim of dower.

100. In *Dodge v. Dodge*,² a testator, by his will, devised to his wife, during her life, the use of the homestead, except such part as he bequeathed to his son. He then gave her an annuity of \$400, during life, charged upon certain lots situate in the city of New York, which lots were divided among his children. It was provided that these lots should be holden to pay their respective shares of the annuity, in proportion to their assessed valuation in the public inventory of property. It was further provided, that the testator's son J. should never possess the right to sell the house and lot devised to him, but that the same should be held by a trustee to be appointed by the court, and the trust should cease at the death of J.; and that J. should not receive any income from the rents or profits of the premises, unless he should become the head of a family, in which case the entire annual income should accrue to him; or, if J. should remain single, at the age of forty years and upwards, and become infirm, or unable to support himself, the trustee was directed to grant him an annuity of \$100, for his support. It was further provided, that as there were certain incumbrances upon the New York lots, the proceeds and profits of the estate, after the necessary current expenses were paid therefrom, should be appropriated to pay the annuity. It was adjudged that the provisions of the will in behalf of the testator's children demonstrated that it was not his intention to give the widow both dower and the annuity, and that she was bound to elect between them.

101. In *Tobias v. Ketchum*,³ it was determined that a claim of dower is inconsistent with the provisions of a will which requires the executors to rent, lease, and repair the estate out of which money is to be raised to pay bequests to the widow.

102. In *Herbert v. Wren*,⁴ a testator devised both real and per-

¹ See *Pickering v. Stamford*, 3 Ves. Jr. 337; 1 Lead. Eq. Cas. 300.

² *Dodge v. Dodge*, 31 Barb. 413.

³ *Tobias v. Ketchum*, 32 N. Y. 319; s. c. 36 Barb. 479.

⁴ *Herbert v. Wren*, 7 Cranch, 370; 2 U. S. Cond. Rep. 534.

sonal estate to his wife; the real estate for her life, remainder to his three daughters. To his two sons he gave certain premises which were subject to an outstanding lease; and he added, that if, during their minority, the lessee should make certain additional improvements thereon, his sons should, at the end of the lease pay to him one-third of the value of such improvements; and in default of payment, that the lessee should hold the same at the rent stipulated in the lease until the value should be received. He also directed two other tracts of land to be sold for the payment of his debts, and that the rent to be paid under the above mentioned lease should be appropriated to the maintenance and education of his children. His will also contained the following clause: "If it should so happen that the remaining part of my estate not herein bequeathed should prove insufficient to pay all just demands against my estate, then my will and desire is, that my executors shall sell as much of my real and personal estate as may be necessary to make up the deficiency, and that they shall sell such parts as will divide the loss among my representatives as nearly as may be in proportion to the property bequeathed to them and each of them." On a bill for dower by the widow of the testator, Marshall, C. J., said: "The value of the provision made for the wife compared with the whole estate, is not in proof; but so far as a judgment on this point can be formed on the evidence furnished by the will itself, it was supposed by him to be as ample as the circumstances would justify. The only fund provided for the maintenance and education of his five children, is the rent of one hundred and forty pounds per annum, payable by P. R. Fendall. Since he has made a distinct provision for his wife, the presumption is much against his intending that this fund should be diminished by being charged with her dower. That part of the will, too, which authorizes P. R. Fendall, in the event of building a mill and not receiving from the sons of the testator their half of its value, to hold the premises until the rent should discharge that debt, indicates an intention that in such case the whole rent should be retained. The clause, too, directing the residue of his estate to be sold for the payment of debts, is indicative of an expectation that the property stood discharged of dower, and is a complete disposition of his whole estate. The testator appears to have considered himself as at liberty to arrange his property without any regard to the incumbrance of dower. Upon this view of the will, it is the opinion of

the majority of the court, that the testator did not intend the provision made for his wife as additional to her dower, and that she can not be permitted to hold both."¹

103. In *Norris v. Clark*,² a bequest to the wife was in the following words: "I give, devise, and bequeath to my wife, Elizabeth M. Clark, six hundred dollars, at the end of six months after my decease, and my gold watch, which she carries, and the silver teaspoons, the two sets of window blinds in the back room, and the hall lamp, which she brought me at or after our marriage; and her acceptance of the above gift shall for ever exclude her from any further demands on my estate." It was insisted that the acceptance of the gift only excluded the widow from further demand against the personal estate. It was held, that if the other parts of the will gave no further indication of the testator's intention, this construction might prevail. But as the testator had disposed of his whole estate, real and personal, through the executor, and the disposition was inconsistent with the widow's enjoyment of her legal right, it was the clear and manifest implication, from the whole will, that the testator did intend the gift to be in lieu of dower, and did not, by the word "estate," mean personal estate only.

104. In *Lord v. Lord*,³ a testator, whose estate was inventoried at about twenty-two thousand dollars, nearly one-half of which was bank stock, after stating substantially in the prefatory part of his will, that he was desirous of disposing of his estate, made provision for the payment of his debts, which proved to be insufficient for that purpose. He then gave his wife, during her widowhood, the use of his dwelling-house, garden and lot adjoining, one-half the rent of his fishery, and the use of one-half of his household furniture, the income of fifty-seven shares of bank stock, and charged upon his home farm the annual payment to her of certain products of such farm, and also gave her absolutely twenty shares of his bank stock. It was held, that the provision so made was in lieu of dower.

105. In *Dixon v. McCue*,⁴ a testator, by his will, directed that his farm should be kept for five years and cultivated by his widow, for the support of his family, and longer if his executor thought it would promote the interests of the family. And in order that the widow might have the means of carrying on the farm, he gave her

¹ See 1 Lead. Eq. Cas. 312.

² *Norris v. Clark*, 2 Stockt. Ch. 51.

³ *Lord v. Lord*, 23 Conn. 327.

⁴ *Dixon v. McCue*, 14 Gratt. 540.

one slave, and personal property to the amount of \$500. He also bequeathed to her a legacy of \$1000, payable out of the proceeds of the realty when sold. The executor was vested with power to sell after the expiration of five years. Upon the sale of the farm as directed, the interest on the amount remaining after paying the legacy to the widow, was to be applied to the maintenance of the family and the education of the children. As each child arrived at the age of twenty-one years, he or she was to receive his or her share of the estate. It was held that it would interfere with the provisions of the will to allow the widow to take dower, and that she must elect.

106. In *Bailey v. Boyce*,¹ a testator left, at his death, his widow and an only daughter, and by his last will gave to each of them absolutely, "one moiety" of all his estate, both real and personal. The widow, having accepted of the provision in her favor, subsequently set up a claim to be endowed of all the real estate of the testator. Her claim was rejected, as inconsistent with the provisions of the will, and conflicting with the evident intention of the testator to make an equal partition of his property.

Parol evidence inadmissible to explain will.

107. Upon this subject, Mr. Roper, observes:² "It is presumed that parol evidence is inadmissible to explain the words of the will by showing that the testator meant by them to pass dower, the effect of which, if admitted, would be to put the widow to election."³

108. That parol evidence is inadmissible to show that a testamentary provision for the widow was intended to be in lieu of dower, or otherwise, has been adjudged in several American cases.⁴ In Virginia, however, the rule has been so far modified by statute and the decisions of the courts, as to allow the circumstances of the testator and the relative situation of the parties, to be referred to

¹ *Bailey v. Boyce*, 4 Strobb. Eq. 84.

² 1 Roper, H. & W. 590.

³ *Stratton v. Best*, 1 Ves. Jr. 285. *Contra*, *Druce v. Denison*, 6 Ves. Jr. 385. See *Doe v. Chichester*, 4 Dow. 65; *Doe v. Jersey*, 3 Barn. & Cress. 870; *Dummer v. Pitcher*, 2 M. & K. 275; ante, § 54.

⁴ *Hall v. Hall*, 8 Rich. Law, 407; *Timberlake v. Parish*, 5 Dana, 345; *Chapin v. Hill*, 1 R. I. 446. See *Bailey v. Duncan*, 4 Mon. 256, 266; ante, ch. xv., §§ 21-25.

as evidence in all inquiries touching the true interpretation of the will.¹

Statutory modification in England.

109. By the statute 3 & 4 Will. IV., ch. 105, which applies to the dower of widows who have been married since January 1, 1834,² the wife's dower will be defeated by a devise of lands, or any estate or interest therein, unless a contrary intention shall be declared by the will.

Statutory changes in the United States.

110. In Massachusetts,³ Maine,⁴ Ohio,⁵ Michigan,⁶ Wisconsin,⁷ Minnesota,⁸ and Oregon,⁹ any testamentary provision in favor of the widow will bar dower unless she elect to waive it, or it plainly appear by the will that the testator intended she should have both. We have already seen that similar enactments have been adopted in Pennsylvania and Indiana.¹⁰ In Kentucky, a devise of real or personal estate will bar dower unless relinquished by the widow. But she may receive her dower in addition to the provision by the will, if such is the intention of the testator plainly expressed in the will or necessarily inferable therefrom.¹¹ In North Carolina,¹² Ten-

¹ *Ambler v. Norton*, 4 Hen. & M. 23; *Herbert v. Wren*, 7 Cranch, 370; 2 U. S. Cond. R. 534; *Dixon v. McCue*, 14 Gratt. 540. See *Wootton v. Redd*, 12 Gratt. 205.

² Ante, vol. i., Appendix.

³ Gen. Stat. Mass. p. 478, § 24; *Reed v. Dickerman*, 12 Pick. 146; *Crane v. Crane*, 17 Pick. 422; *Delay v. Vinal*, 1 Met. 57; *Adams v. Adams*, 5 Met. 277; *Fay v. Fay*, 1 Cush. 93.

⁴ Rev. Stat. Maine, 1857, p. 606, § 12; *Allen v. Pray*, 12 Maine, 138; *Hastings v. Clifford*, 32 Maine, 132.

⁵ 2 Rev. Stat. Ohio, p. 1623, § 43. See *Stilley v. Folger*, 14 Ohio, 610; *Thompson v. Hoop*, 6 Ohio St. 480; *Parker v. Parker*, 13 Ohio St. 95; *Moore v. Stidel*, 4 Weekly Law Gaz. 65.

⁶ 2 Comp. Laws Mich. p. 853, § 18.

⁷ Rev. Stat. Wis. 1858, p. 547, § 18.

⁸ Stat. Minn. 1858, p. 409, § 18.

⁹ Stat. Oregon, 1855, p. 407, § 18.

¹⁰ Ante, § 4; *Purdon's Dig. by Brightly*, p. 362, § 4; p. 1017, § 13; 1 Rev. Stat. Ind. 1852, p. 255, § 41.

¹¹ 1 Rev. Stat. Ky. by Stanton, p. 424, § 13; 2 Ibid. p. 26. See *Bailey v. Duncan*, 4 Mon. 256; *Wood v. Lee*, 5 Mon. 50; *Shaw v. Shaw*, 2 Dana, 341; *Timberlake v. Parish*, 5 Dana, 345; *Cummings v. Daniel*, 9 Dana, 361; *Barnett v. Barnett*, 1 Met (Ky.) 254; *Yancy v. Smith*, 2 Met. (Ky.) 408; *Tevis v. McCreary*, 3 Met. (Ky.) 151.

¹² Rev. Code N. C. 1855, p. 601, § 1. See *Craven v. Craven*, 2 Dev. Eq. 338; *Bray v. Lamb*, Ibid. 372; *Pettijohn v. Beasley*, 1 Dev. & Bat. L. 254; *Wilson v. White*,

nessee,¹ Florida,² and Alabama,³ any provision for the widow in the will bars dower unless she dissent as prescribed by law. In Arkansas, if either lands or slaves are devised to the widow, the devise is deemed and taken in lieu of dower, unless otherwise declared in the will.⁴ In Maryland, the statute declares that every devise of land, or bequest of personal estate to the wife of the testator, shall be construed to be intended in bar of her dower in lands, or share of the personal estate respectively, unless otherwise expressed in the will. If the husband devise a part of both real and personal estate, she is required to renounce the whole, or be barred of her right to both. If he devise only a part of the real estate or only a part of the personal estate, it shall bar her of only the real or personal estate, as the case may require; but if the will expressly direct that the devise of either real or personal estate, or of both, shall be in lieu of her legal share of one or both, she shall be barred accordingly, unless she renounce the will.⁵ In New Jersey, a devise of real estate will bar dower, whether so expressed in the will or not, unless the wife dissent.⁶ In Delaware,⁷ Illinois,⁸ Missouri,⁹ and Kansas,¹⁰ every devise of real estate to the wife of the testator, shall be deemed in lieu of dower, unless he, by his will, otherwise declare.

2 Dev. Eq. 29; *Sanderlin v. Thompson*, 2 Dev. Eq. 539; *Redmond v. Coffin*, 2 Dev. Eq. 437; *Ford v. Whedbee*, 1 Dev. & Bat. L. 16; *Brown v. Brown*, 5 Ired. L. 136; *Lewis v. Lewis*, 7 Ired. 72; 1 Laws N. C. 1821, p. 673, § 1.

¹ Code Tennessee, 1858, § 2404. See *Reid v. Campbell*, Meigs, 378; *McDaniel v. Douglas*, 6 Humph. 220; *Malone v. Majors*, 8 Humph. 577; *Armstrong v. Park*, 9 Humph. 195.

² Thompson's Dig. p. 184, § 1.

³ Clay's Dig. p. 172, §§ 1, 3. See *Hilliard v. Binford*, 10 Ala. 977; *Vaughan v. Vaughan*, 30 Ala. 329; *Reaves v. Garrett*, 34 Ala. 558; *Martin v. Martin*, 35 Ala. 560; *Green v. Green*, 7 Porter, 19; *McLeod v. Donnel*, 6 Ala. 236; *Pearson v. Darlington*, 30 Ala. 227; *Bell v. Mason*, 10 Ala. 334.

⁴ Dig. Stat. Ark. 1858, p. 454, § 24. See p. 452, § 13.

⁵ 1 Md. Code, p. 682, §§ 284, 286, 287. See *Collins v. Carman*, 5 Md. 503.

⁶ Nixon's Dig. p. 211, § 16; *Thompson v. Egbert*, 2 Harris. 460; *Stark v. Hunton*, Saxton, Ch. 216, 228; *White v. White*, 1 Harr. 202; *Morgan v. Titus*, 2 Green, Ch. 201; *Van Arsdale v. Van Arsdale*, 2 Dutch. 404.

⁷ Del. Rev. Code, 1852, p. 291, § 5; *Chandler v. Woodward*, 3 Harring. 428; *Kinsley v. Woodward*, 3 Harring. 454.

⁸ 1 Stat. Ill. 1858, p. 152, § 10; *Sturgis v. Ewing*, 18 Ill. 176; *Jennings v. Smith* 29 Ill. 116.

⁹ 1 Rev. Stat. Misso. 1855, p. 671, § 15; *Davis v. Davis*, 5 Misso. 183; *Halbert v. Halbert*, 19 Misso. 453; *Pemberton v. Pemberton*, 29 Misso. 408.

¹⁰ Comp. Laws Kansas, 1862, p. 479, § 10.

111. The statute of Mississippi is nearly identical with that of Maryland, above referred to.¹ But by a further provision it is declared, that if the wife have a separate property at the time of the death of her husband, equal in value to what would be her lawful portion of her husband's real and personal estate, and he has made a will, she shall not be at liberty to dissent from the will and elect to take her dower. But if her separate property be not equivalent in value to what would be the value of her dower and distributive share of her husband's estate, then she may signify her dissent to the will, as in other cases, and claim to have the deficiency made up to her notwithstanding the will.²

112. In Maryland,³ Alabama,⁴ Kentucky,⁵ and Mississippi,⁶ if the will of the husband contain no provision for the widow, no act of renunciation on her part is necessary.⁷ But in North Carolina, the point has been otherwise determined.⁸

113. In Pennsylvania⁹ and South Carolina,¹⁰ a testamentary provision for the widow does not bar her of dower in lands conveyed by the husband during coverture. In Iowa,¹¹ she may have dower in lands sold on execution against the husband in his lifetime. In South Carolina¹² and New Jersey,¹³ the widow is not barred of dower in lands acquired subsequently to the making of the will as to which the husband died intestate; nor in the last named State is she precluded from demanding dower by a devise of lands lying in another State.¹⁴ In Maine¹⁵ and New York,¹⁶ it is held that the bar extends

¹ Rev. Code Missis. 1857, p. 161, art. 162; p. 468, art. 168; p. 469, art. 170. See *Fulton v. Fulton*, 30 Missis. 586; *Roberts v. Roberts*, 34 Missis. 322.

² Rev. Code Missis. 1857, p. 337, art. 30.

³ 1 Md. Code, p. 682, § 288.

⁴ *Green v. Green*, 7 Porter, 19; *Martin v. Martin*, 35 Ala. 560.

⁵ *Cummings v. Daniel*, 9 Dana, 361.

⁶ *Roberts v. Roberts*, 34 Missis. 322; Rev. Code Missis. 1857, p. 469, art. 170.

⁷ See *Drummond v. Drummond*, 40 Maine, 35.

⁸ *Lewis v. Lewis*, 7 Ired. L. 72. But see *Miller v. Chambers*, stated in *Craven v. Craven*, 2 Dev. Ch. 338.

⁹ *Borland v. Nichols*, 12 Pa. St. (2 Jones), 38; *Melizet's Appeal*, 5 Harris, 453. See *Leinaweaver v. Stoeve*, 1 Watts & S. 160; *Gray v. McCune*, 23 Pa. St. 447.

¹⁰ *Braxton v. Freeman*, 6 Rich. L. 35. See, also, *Higginbotham v. Cornwell*, 8 Gratt. (Va.) 83.

¹¹ *Corriell v. Ham*, 2 Clarke (Iowa), 552.

¹² *Hall v. Hall*, 2 M'Cord's Ch. 269.

¹³ *Van Arsdale v. Van Arsdale*, 2 Dutch 404. In *Stark v. Hunton*, Saxton's Ch. 217, the court were in doubt upon this point.

¹⁴ *Van Arsdale v. Van Arsdale*, 2 Dutch. 404. ¹⁵ *Allen v. Pray*, 12 Maine, 138.

¹⁶ *Steele v. Fisher*, 1 Edw. Ch. 435.

to lands conveyed by the husband; and in Georgia,¹ the rule is the same as to lands acquired subsequently to the execution of the will. In Illinois,² if the will direct lands to be sold and the proceeds paid to the widow, this is regarded as a bequest of personalty, and does not bar dower.

¹ *Raines v. Corbin*, 24 Geo. 185.

² *Jennings v. Smith*, 29 Ill. 116. *Contra*, *Barnett v. Barnett*, 1 Met. (Ky.) 254.

CHAPTER XVII.

ELECTION BY THE WIDOW TO TAKE UNDER HER HUSBAND'S WILL.

§ 1. The widow is entitled to be informed before electing of the true condition of the estate.

2-5. The right of election must be exercised by the widow in person.

6-9. Election where the widow is insane.

10, 11. Election where the widow is an infant or has contracted a second marriage.

12-14. The election must be made within the time prescribed by law.

15-26. Express election.

27-36. Implied election.

37-46. The widow must be fully informed of her rights and intend to elect.

47-53. Widow not concluded by an election made under a mistake as to the condition of the estate.

54, 55. An election induced by fraud not binding upon the widow.

56-58. Remedy of the widow where she has been deprived of the provision given in lieu of dower.

59-64. A widow taking a testamentary provision in lieu of dower, is regarded as a purchaser for a valuable consideration.

The widow is entitled to be informed before electing of the true condition of the estate.

1. IN cases where the widow is bound to elect between her dower and the benefits given to her by her husband's will, she is entitled to have the respective values and amounts of her two interests ascertained before she elects between them; and she may file a bill in equity for the ascertainment of those interests; for an election can not be satisfactorily made between the two estates until the person electing actually knows their relative values.¹

¹ 1 Roper, H. & W. 600; 2 Story's Eq. § 1098; 1 Lead. Eq. Cas. 301, 320; Newman v. Newman, 1 Bro. C. C. 186; Edwards v. Morgan, 13 Price, 787; Wake v. Wake, 3 Bro. C. C. 255; 1 Ves. Jr. 335; Chalmers v. Storil, 2 V. & B. 222; Hénder v. Rose, 3 P. Wms. 124, note; Whistler v. Webster, 2 Ves. Jr. 367, 371; Boynton v. Boynton, 1 Bro. C. C. 445; Kidney v. Coussmaker, 12 Ves. Jr. (Sumner's ed.) 136, note (a); Buttricke v. Brodhurst, 3 Bro. C. C. 88; 1 Ves. Jr. 171; Pusey v. Desbouvrie, 3 P. Wms. 315; United States v. Duncan, 4 McLean, 99; Melizet's Appeal, 17 Pa. St. (5 Harris), 449; Hall v. Hall, 2 McCord's Ch. 269. The Tennessee statute provides, that to enable a widow to act as her interests may require, the executor or administrator shall disclose to her, upon her application, before the expiration of the period within which she is required to make her election, the condition of her husband's estate. Code Tenn. 1858, § 2405. See post, §§ 32-40.

The right of election must be exercised by the widow in person.

2. Except where otherwise provided by law, the statutory right of election conferred upon the widow in cases of the character now under consideration, is regarded as a strictly personal right, and can not be exercised by another person in her behalf.¹ In the application of this rule, it has been held, that the incapacity of the widow to elect by reason of insanity, furnishes no sufficient cause for its relaxation.²

3. In *Boone v. Boone*,³ the case was this: A testator died, leaving a widow, to whom he bequeathed a part of his personal estate. The widow died before the expiration of forty days after her husband's death, without having made her election whether she would abide by the will or not. The question was, whether the representatives of the widow could, after her death, do such an act as would amount to a renunciation of the will, and be entitled to such part of the personal estate as would have gone to the widow had she renounced the will. The court "was of opinion that the representatives had no right to the privilege which the law allows the widow, being intended entirely for her benefit and personal privilege."

4. A similar ruling was made in Massachusetts, in the case of *Sherman v. Newton*.⁴ There, the widow died within seven days after the decease of her husband, and before the probate of his will. Her administrator and children joined in an application to the probate court to be permitted to waive the provisions made for her by the will, and the application was denied. "The right of waiving these provisions," said the court, after referring to the language employed in the statute, "is thus given directly, and in explicit terms to the widow; and no other person is mentioned as having it in common with, or deriving it by inheritance, or in succession from her. As all persons of full age and sound mind are allowed to dispose of their real and personal estate by a final testament duly executed, the distribution of it is to be made in conformity to the devises, bequests and directions which are therein

¹ *Sherman v. Newton*, 6 Gray, 307; *Boone v. Boone*, 3 Har. & McH. 95; *Hinton v. Hinton*, 6 Ired. L. 274; *Lewis v. Lewis*, 7 Ired. L. 72; *Collins v. Carman*, 5 Md. 503. See *Welch v. Anderson*, 28 Misso. 293.

² *Lewis v. Lewis*, 7 Ired. L. 72; *Collins v. Carman*, 5 Md. 503; post, §§ 6-8.

³ *Boone v. Boone*, 3 Har. & McH. 95 (1791). ⁴ *Sherman v. Newton*, 6 Gray, 307.

set forth; and no diversion of it to other objects or purposes is permitted, except in particular instances specially provided for by law. To a limited extent, the power of insisting upon such a diversion is conferred by this statute, for her own benefit, upon the widow of a deceased testator. But to make it effectual, the power is to be exercised personally by her, and upon the terms and conditions, and within the period for that purpose prescribed. . . . The motives by which she in her lifetime, and her heirs at law after her decease would be influenced, in respect to provisions made in the last will of her husband in her behalf, may not, and are not likely to be the same. They would often make their estimates of personal interest upon a different basis. A will may be so made, that upon the most prudent and exact calculation and estimate of the value of its provisions in behalf of the widow, it would be found much more to her advantage to accept than to reject them, while the very reverse would be true with respect to her heirs at law. . . . There are other influences which would be far from having the like effect upon these different parties. The widow might be actuated by motives, decisive with her, but which might prove to be far more lightly appreciated or altogether disregarded by her heirs at law. Many reasons might induce her to acquiesce in the disposition of her husband's property which would be inconclusive and inefficient with them. The will may have been made in conformity to some arrangement mutually understood and consented to, though not having of itself any legal force; this, or, it may be, mere respect for his wishes, or perception of the urgent wants, or meritorious character, of those whom he has chosen to make the objects of his regard and favor, might successfully prevail with her to forbear from disturbing his arrangements, though each of these considerations would wholly fail to have any effect upon the minds of those who, in the event of her death, would become entitled to her estate."

5. In North Carolina, it has been held, that a widow can not renounce her husband's will by attorney; but that the dissent must be made by her personally in open court.¹ But now by statute in that State, an adult widow may elect by attorney.² So, in Delaware, in case of the inability of the widow to appear, her election may be made by attorney duly constituted in writing.³

¹ *Hinton v. Hinton*, 6 Ired. L. 274.

² Rev. Code N. C. 1855, p. 601, § 1.

³ Del. Rev. Code, 1852, p. 290, § 7.

Election where the widow is insane.

6. In *Collins v. Carman*,¹ a testator made provision by will, for his wife, who was insane at its date, and continued so until her own death, which occurred more than four years after that of her husband. It was held, that her administrator could not renounce the will for the benefit of her estate, nor claim the share of the property of her husband to which she would have been entitled, had he died intestate. "The language of the Act," it was said, "is comprehensive enough to include every widow, whether sane or insane, and the Act having made no exception in favor of the latter, the courts can make none, whether they be courts of law or equity. . . . Where the law directs an act to be done, or a condition to be performed for the purpose of conferring a right, that right can not be acquired if the act is left undone or the condition is not performed."

7. So where a testator died, having made no provision by his will for his wife, and the wife was a lunatic, under the care of a committee, it was decided that she could not claim by petition any portion of the testator's estate.² This ruling was placed upon the ground that the widow was incapable, from want of reason, of dissenting herself, and her committee had no authority by law, to enter a dissent in her behalf. "There is no proviso, or saving in the statute," the court remarked, "that in case the widow be a lunatic, then her committee may dissent for her. When the legislature has not thought proper to insert such a proviso in the Act, it seems to us to be asking of the court too much, for it is to take such a proviso by way of construction, to the statute. In the case of *Hinton v. Hinton*,³ we held that a widow could not dissent from her husband's will by attorney, and that she must be personally present in court. The object was to have record evidence, both as to the time and the fact. How can it be said that the widow was dissatisfied with her husband's will, when she was, at the time a lunatic, and incapable of a rational satisfaction or dissatisfaction with it? The dissent was not hers, but that of the guardian."

8. By the present statute of North Carolina, the guardian of an insane woman may act in her behalf in dissenting from her husband's will.⁴ In Ohio, it is provided, that if the widow is unable to make her election by reason of insanity or imbecility of mind, it

¹ *Collins v. Carman*, 5 Md. 503.

² *Lewis v. Lewis*, 7 Ired. L. 72.

³ *Hinton v. Hinton*, 6 Ired. L. 274.

⁴ Rev. Code N. C., 1855, p. 601, § 1.

shall be the duty of the probate court, as soon as the facts come to the knowledge of the court, at any time within one year after the death of the testator, to appoint some suitable person to ascertain the value of the provision made for the widow by the testator, and the value of her rights under the law in his estate; and if the court is satisfied, on the coming in of the report of the person so appointed, that the testamentary provision is more valuable and better for the widow than her rights under the law, an entry shall be made on the minutes of the court that she elects to take under the will; and the election so made shall have the same force and effect as if made by the widow in person.¹

9. In Maine, if an insane widow waive a provision made for her in her husband's will, and at no lucid interval evinces a disposition to avoid the waiver, and if the waiver be confirmed by her guardian, it can not be objected that it was inoperative.²

Election where the widow is an infant, or has contracted a second marriage.

10. There are cases of election in other departments of equity, where infants and *femes covert* can not make a binding decision; but they may be compelled to elect, in cases of the present nature, where the choice lies between two inconsistent rights and there is a clear intention on the part of the testator, that both shall not be enjoyed, and it is therefore against conscience to retain both.³ It was held in *Addison v. Bowie*,⁴ that the court will make election for infants; and in doing so, will be guided altogether by a view to the benefit of the infant on a consideration of all the circumstances. In the English practice, where an infant is bound to elect, the period of election is, in some instances, deferred until after the infant comes of age.⁵ In other cases there has been a reference to a master to inquire what would be most beneficial to the infant.⁶

¹ 2 Rev. Stat. Ohio, p. 1624, § 46.

² *Brown v. Hodgdon*, 31 Maine, 65.

³ 1 Lead. Eq. Cas. 321; *Robertson v. Stephens*, 1 Ired. Eq. 247, 251. See *Tiernan v. Roland*, 3 Harris (Pa.), 430, 451.

⁴ *Addison v. Bowie*, 2 Bland, Ch. 606, 623.

⁵ *Streatfield v. Streatfield*, Cas. temp. Talbot, 176. See *Boughton v. Boughton*, 2 Ves. Sen. 12; *Bor v. Bor*, 3 Bro. P. C. 173, Toml. ed.

⁶ *Chetwynd v. Fleetwood*, 1 Bro. P. C. 300, Toml. ed.; 2 S. & L. 266; *Goodwyn v. Goodwyn*, 1 Ves. Sen. 226; *Bigland v. Huddleston*, 3 Bro. C. C. 285, note; *Gretton v. Haward*, 1 Swanst. 413.

The practice as to election by married women also varies;¹ but in general a reference is made to a master, to inquire what is most beneficial for them, and they are required to elect within a limited time.²

11. In North Carolina, it is required by statute, that an election by an infant widow shall be made by guardian.³ An election by her personally is erroneous.⁴

The election must be made within the time prescribed by law.

12. It was held in *Ex parte Delilah Moore*,⁵ that the widow can not waive provisions in lieu of dower, contained in her husband's will, and insist upon her rights under the law, after the expiration of the time within which she is required to make her election. In that case, the widow filed her renunciation within two or three days after the time fixed by the statute had elapsed. "It is a dangerous expedient," said the court, "to extend the terms of a statute by construction, beyond their obvious import. In attempting thus to moderate the apparent rigor of a rule, we may do more mischief than by a strict adherence to it. It would tend to destroy the certainty of the law, and thereby increase litigation, and disturb the repose of society. It is true that in this case, the stretch is small, extending only to two or three days; but there must be some fixed point, some settled boundary; and place it where we may, it is liable to exclude some claim, perhaps equally meritorious with this. It is better, therefore, to abide by the law as it is written, than to create exceptions, without being able to foresee where they may end."

13. There is much force in the above reasoning; and the rule adopted by the court, notwithstanding its strictness, would seem to be just and proper, and in conformity to principle. It should be so limited, however, it is apprehended, as not to conflict with the well established doctrine before referred to,⁶ entitling the widow to compel a showing of the condition and value of her husband's estate

¹ See note by Swanston, to *Gretton v. Haward*, 1 Swanst. 413.

² 1 Lead. Eq. Cas. 303. See *Pulteney v. Darlington*, 7 Bro. P. C. 546, 547, Toml. ed.; 2 Ves. Jr. 560; 3 Ves. Jr. 385; *Vane v. Lord Dungannon*, 2 S. & L. 133; *Davis v. Page*, 9 Ves. Jr. 350; *Barrow v. Barrow*, 4 Kay & J. 409.

³ Rev. Code N. C. p. 601, § 1.

⁴ *Cheshire v. McCoy*, 7 Jones, L. 376.

⁵ *Ex parte Delilah Moore*, 7 How. (Missis.) 665; cited and approved in *Collins v. Carman*, 5 Md. 503; accord. *Nicholas v. Nicholas*, Ky. Dec. 402. See *Shaw v. Shaw*, 2 Dana, 341.

⁶ Ante, § 1.

before making her election. The privilege thus secured to her, the exercise of which, in many cases, is absolutely necessary to intelligent action on her part, would be of little practical value, if, in consequence of legal delays and impediments, she were prevented from acquiring the requisite information until after the statute had intervened and cut off her right.

14. There are decided cases in which the limitation upon the rule above suggested appears to have been recognized and applied. Thus, in a proceeding instituted to obtain a construction of the will of a decedent, the principal trusts were declared void, and the widow was directed to elect between her dower and certain valid provisions made for her by the will. Appeals were taken from the decree, which protracted the suit. The widow died while the appeals were pending and before the final decision, without having made her election. After an affirmance of the decree the vice chancellor, to whom the suit was remitted by the appellate court, permitted the administrator of the widow to make the election granted to her, although the time limited therefor had elapsed in her lifetime.¹ So, in a case determined in New Jersey, it was held that a widow is excused in declining to make her election when required to do so by the executors, while a controversy is pending respecting the will of the testator and affecting real estate with which her rights under the will are connected.² "A controversy was pending," said the chancellor, "respecting the will of the testator, so far as it affected the real estate; with that controversy her rights under the will were in a degree connected; and I think she is excused, at least, if not justified, in declining to receive the legacy until the matter was settled."

Express election.

15. The statutes of the various States point out the manner in which the widow shall declare her election between the provisions in her favor contained in her husband's will and her dower under the law. In New York she is deemed to have elected to take under the will, unless within one year after the death of her husband she enter on the lands to be assigned for her dower, or commence proceedings for its recovery or assignment.³ And this statute applies

¹ Howland v. Heckscher, 3 Sandf. Ch. 519.

² Dutch Church v. Ackerman, Saxton, Ch. 40.

³ 1 Rev. Stat. N. Y. 742, § 14.

whether the wife knew of the provisions of the will or not, unless, perhaps, in case of a fraudulent concealment. The devisees and grantees of the husband are under no obligation to give her notice.¹ It is not necessary, for the purpose of making a valid election by the widow, that she should make entry upon or commence proceedings for the recovery of dower in every distinct parcel of the lands in which she is entitled to dower. It is sufficient, if she has not accepted the provision made for her in lieu of dower, that she actually commences proceedings, within the year, for the recovery or assignment of her dower in any part of the lands as to which her right of election exists, or that she enters upon any part of such lands claiming her dower therein.² So, if a widow give notice to the person in possession, of her election to have dower, and such person thereupon admit her right, and voluntarily pay her a part of the rents and profits of the land as and for her dower therein, it is, in equity, a valid election by her, and is equivalent to an entry on the lands, or an assignment of dower, for the purpose of determining such election. Thus, where a testator devised certain lands to his widow, and also bequeathed to her an annuity, in lieu of her dower in his real estate, and the widow, within two months after his death executed a deed of relinquishment of the provisions made by the will, and elected to take her dower, and procured the deed to be recorded, and gave notice of such election to the executors and trustees, who recognized her right to dower, and made payments to her out of the rents and profits of the estate on account of her dower, it was held that this was a valid election by the widow to take her dower, and was equivalent to an actual entry on the land, or the commencement of proceedings for the recovery of her dower, within the provisions of the revised statutes.³

16. In Massachusetts,⁴ Maine,⁵ Illinois,⁶ Missouri,⁷ Arkansas,⁸

¹ *Palmer v. Voorhis*, 35 Barb. 479.

² *Hawley v. James*, 5 Paige, 318.

³ *Hawley v. James*, 5 Paige, 318. See *McCartee v. Teller*, 2 Paige, 511; s. c. 8 Wend. 267.

⁴ Gen. Stat. Mass., p. 478, § 24; *Reed v. Dickerman*, 12 Pick. 146; *Pratt v. Felton*, 4 Cush. 174.

⁵ Rev. Stat. Maine, 1857, p. 606, §§ 11, 12; *Perkins v. Little*, 1 Greenl. 148; *Brown v. Hodgdon*, 31 Me. 65; *Hastings v. Clifford*, 32 Me. 132; *Allen v. Pray*, 3 Fairf. 138. See *Gowen, Appellant*, 32 Me. 516.

⁶ 1 Stat. Ill. 1858, p. 152, § 11. See *Jennings v. Smith*, 29 Ill. 116.

⁷ 1 Rev. Stat. Misso., p. 671, § 16; *Halbert v. Halbert*, 19 Misso. 453. See *Davis v. Davis*, 5 Misso. 183; *Hamilton v. O'Neil*, 9 Misso. 11.

⁸ Dig. Stat. Ark. 1858, p. 452, § 14.

Florida,¹ Wisconsin,² Minnesota,³ Michigan,⁴ Connecticut,⁵ Rhode Island,⁶ Oregon,⁷ New Hampshire,⁸ Kansas,⁹ Delaware,¹⁰ North Carolina,¹¹ Tennessee,¹² Alabama,¹³ New Jersey,¹⁴ Kentucky,¹⁵ Mississippi,¹⁶ Vermont,¹⁷ Virginia,¹⁸ and Maryland,¹⁹ a failure by the widow to make her election within the time limited by law is regarded as conclusive evidence of her acceptance of the provision made by the will, and a waiver of her right of dower. In New York, Kentucky, Michigan, Wisconsin, Minnesota, Oregon and Arkansas, the prescribed period is one year after the husband's death. In Missouri, Kansas, Georgia, Rhode Island, Illinois, Florida, Tennessee and Alabama, it is one year after probate of the will. In Massachusetts, Maine, New Jersey, Maryland, North Carolina and Mississippi, it is six months after probate of the will.

¹ Thompson's Dig., p. 184, § 1.

² Rev. Stat. Wis. 1858, p. 548, § 19.

³ Stat. Minn. 1858, p. 409, § 19.

⁴ 2 Comp. Laws Mich., p. 853, § 19.

⁵ Stat. Conn. 1854, p. 383, § 20.

⁶ Rev. Stat. R. I. 1857, p. 506, § 21.

⁷ Stat. Oregon, 1855, p. 407, § 19.

⁸ N. H. Comp. Stat. 1853, p. 401, § 12.

⁹ Comp. Laws Kansas, 1862, p. 479, § 11.

¹⁰ Del. Rev. Code, 1852, p. 290, § 8.

¹¹ Rev. Code, N. C. 1855, p. 601, § 1; *Pettijohn v. Beasley*, 1 Dev. & B. L. 254; *Craven v. Craven*, 2 Dev. Ch. 338; *Sanderlin v. Thompson*, 2 Dev. Ch. 539; *Redmond v. Coffin*, *Ibid.* 437; *Ford v. Whedbee*, 1 Dev. & B. L. 16; *Brown v. Brown*, 5 Ired. L. 136; *Lewis v. Lewis*, 7 Ired. L. 72; *Hinton v. Hinton*, 6 Ired. L. 274; *Jones v. Jones*, *Busbee*, L. 177.

¹² Code Tennessee, 1858, § 2404; *McDaniel v. Douglas*, 6 Humph. 220; *Malone v. Majors*, 8 Humph. 577; *Armstrong v. Park*, 9 Humph. 195; *Smart v. Waterhouse*, 10 Yerg. 94; *Reid v. Campbell*, *Meigs*, 378.

¹³ Clay's Dig., p. 172, § 3; *Inge v. Boardman*, 2 Ala. 331; *Hilliard v. Binford*, 10 Ala. 977; *Vaughan v. Vaughan*, 30 Ala. 329; *Martin v. Martin*, 35 Ala. 560.

¹⁴ Nixon's Dig., p. 211, § 16; *Stark v. Hunton*, *Saxton*, Ch. 216; *White v. White*, 1 Harris. 202; *Thompson v. Egbert*, 2 Harris. 460; *Van Arsdale v. Van Arsdale*, 2 Dutch. 404; *Morgan v. Titus*, 2 Green, Ch. 201.

¹⁵ 2 Ky. Rev. Stat. by Stanton, p. 26, § 7; *Bailey v. Duncan*, 4 Mon. 256; *Vance v. Campbell*, 1 Dana, 229; *Shaw v. Shaw*, 2 Dana, 341; *Timberlake v. Parish*, 5 Dana, 345; *Cummings v. Daniel*, 9 Dana, 361; *Barnett v. Barnett*, 1 Met. (Ky.) 254; *Wood v. Wood*, *Ibid.* 512.

¹⁶ Rev. Code Missis. 1857, p. 468, art. 169; *Ex parte Delilah Moore*, 7 How. (Missis.) 665; *Sanders v. Sanders*, 14 S. & M. 81; *Roberts v. Roberts*, 34 Missis. 322. See Rev. Code, p. 161, art. 162.

¹⁷ Gen. Stat. Verm., p. 412, § 6; *Smith v. Smith*, 20 Verm. 270.

¹⁸ Code Va. 1849, p. 474, § 5; *Blunt v. Gee*, 5 Call, 481; *Noell v. Garnett*, 4 Call, 92; *Bernard v. Hipkins*, 6 Call, 101; *Findley v. Findley*, 11 Gratt. 434. See *Taylor v. Brown*, 2 Leigh, 419.

¹⁹ 1 Md. Code, p. 682, § 285; *Collins v. Carman*, 5 Md. 503. See *Coomes v. Clements*, 4 Har. & J. 480.

In Vermont, it is eight months after the will has been proved. In Connecticut, the widow is required to elect within two months after the expiration of the time limited for the exhibition of claims against the estate. In Delaware, she is required to appear and make her election within thirty days after receiving notice by citation from the court.¹ The Revised Statutes of Indiana omit to fix the time within which the widow shall elect, and it is held in that State, that she may make her election at any time, and that lapse of time will not affect her right to take under the law.² In Maryland, New Jersey, Connecticut, Vermont, Rhode Island, Illinois and Mississippi, the renunciation of the will must be in writing filed in the proper court. In Massachusetts, the waiver may be in writing filed in the probate office. In Kentucky, the relinquishment by the widow must be acknowledged or proved before, and left with the clerk of the county court. In Missouri and Kansas, the renunciation must be in writing, executed and acknowledged as in cases of deeds for land; and it must be filed in the office of the court in which the will is proven and recorded. In Arkansas, if the widow elect to be endowed, she is required, within eighteen months after the death of her husband, to convey by deed of release and quitclaim, to the heirs of the deceased, the estate devised to her; the deed so made must be acknowledged, or proven and recorded in the same manner as other deeds for real estate. A renunciation in this form is sufficient without further notice.³

17. In a case in Massachusetts, where a wife died in seven days after her husband, without expressly waiving the provision made for her in his will, or claiming dower, it was held that her acceptance of the provision might be presumed, it being more beneficial to her than her right to dower.⁴ But where a widow to whom real estate had been devised by her husband, made a demand of dower in his estate, and afterwards, being in possession of the premises devised to her, leased them to a tenant, who entered and occupied the same, it was held, that whether the terms of the statute would be complied with or not by an implied election,⁵ the facts stated were no evidence of the election required by the statute.⁶

18. In North Carolina, in a case where a widow, being under

¹ See the statutes of the several States above referred to.

² *Piercy v. Piercy*, 19 Ind. 467. See *Smith v. Baldwin*, 2 Ind. 404.

³ See the statutes before cited.

⁴ *Merrill v. Emery*, 10 Pick. 507.

⁵ *Post*, §§ 27-36.

⁶ *Pratt v. Felton*, 4 Cush. 174.

age, and having no guardian, dissented from her husband's will in person, in open court; and on petition, dower was assigned to her by a decree of the proper tribunal, it was decided, that although the dissent should have been made by guardian, as required by the statute, yet dower having been assigned by the judgment of a court of competent jurisdiction, her right to it could not be impeached in an action of ejectment brought by her for its recovery.¹

19. In New Jersey, it is held, that to constitute an election by a widow, there must be something more than a mere intention or determination to elect. A declaration of such intention, even if made to those interested, will not of itself constitute an election at law.² Nor will the signing of a petition to the legislature for a sale of the real estate of the testator, to enable the executors to pay the legacies and execute the various trusts mentioned in the will, if the petition be not acted on, constitute a legal election.³ Nor will the fact that an answer to a bill in chancery was filed in her name, assenting to a decree for the sale of the real estate of the testator, to carry into effect the trusts of the will, (one of which was the payment of an annuity bequeathed to the widow in lieu of her dower,) and a decree made for such sale, constitute an election, if it appear that she was merely quiescent in the matter, and that the answer as filed, was neither signed nor assented to by her.⁴

20. In Kentucky, the filing of a bill by a widow for dower is held not to be equivalent to a renunciation of the provisions of the will by her husband.⁵ "No aid," the court remarked in the case referred to, "can be derived to the complainant's case from the fact that her bill was filed before the twelve months allowed for making her renunciation had elapsed. It is sufficient to say, that this is not the mode of renunciation pointed out by the statute, and we have no power to adopt a substitute." But a conditional renunciation made in writing and attested, which is to take effect within the time allowed by statute for renouncing the will, is held valid, though the widow die before it be proved and recorded.⁶ And she may make her death the condition on which the renunciation shall become absolute, if it happen within the time allowed for making an election.⁷

¹ *Cheshire v. McCoy*, 7 Jones, L. 376.

² *English v. English*, 2 Green, Ch. 504.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Shaw v. Shaw*, 2 Dana, 341.

⁶ *McCallister v. Brand*, 11 B. Mon. 370. The question whether it was necessary to record the renunciation at all, or within the year, was left undecided.

⁷ *Ibid.*

21. In Mississippi, it is held, that while the probate of a will, made in vacation, is not valid, inasmuch as the power of the judge out of court is confined to receiving the will exhibited for probate, and does not extend to the probate itself; yet if a will, making provision for the widow of the testator be admitted to probate, and letters testamentary granted in vacation; and all parties acquiesce in the probate as a valid one; and the executor proceed with the administration of the estate for a period of seven years, the widow during all that time receiving her allowance under the will, she will be deemed to have waived any objection she might originally have made to the probate, and to be barred by the terms of the will.¹

22. By the Pennsylvania statute, "in every case of a devise or bequest to a widow, which, by force of any last will and testament, or by operation of law, will bar such widow of dower, subject to her right of election of dower, or of the property devised or bequeathed, it shall be lawful for the orphans' court, on the application of any person interested in the estate of the decedent, to issue a citation, at any time after twelve months from the death of the testator, to any such widow, to appear at a certain time not less than one month thereafter, in the said court, to make her election, either to accept such devise or bequest in lieu of dower, or to waive such devise or bequest and take her dower, of which election a record shall be made, which shall be conclusive on all parties; if the widow shall neglect or refuse to appear upon such citation, then upon due proof to the court of the service thereof, the said neglect or refusal shall be deemed an acceptance of the devise or bequest, and a bar of dower, of which a record shall be made, which shall be conclusive on all parties concerned."²

23. The foregoing provision has reference to the common law dower³ of the widow, and not to her share under the intestate Acts.⁴ And she can not be called upon to make her election, by any person or tribunal, before the expiration of the twelve months given by the Act.⁵ And where, on being cited to make her election, the widow claims her dower and share of the personal estate, a party asserting a previous election to take under the will, must establish it

¹ *Sanders v. Sanders*, 14 Smedes & Marsh. 81.

² Purdon's Dig. by Brightly, p. 362, § 6.

³ See vol. i., ch. xx., §§ 18-20.

⁴ *Hinnershits v. Bernhard*, 13 Pa. St. (1 Harris), 518; *Paul v. Paul*, 36 Pa. St. (12 Casey), 270, 280. See *Melizet's Appeal*, 17 Pa. St. (5 Harris), 449; *Wilson v. Hamilton*, 9 S. & R. 424.

⁵ *Anderson's Appeal*, 36 Pa. St. (12 Casey), 476.

by clear and positive testimony.¹ Notwithstanding the requirement of the statute that the election shall be made in the orphans' court, it is settled that an election by a widow to take under the will, although not made in that court, will estop her from claiming dower.²

24. In Ohio, if any provision be made for a widow in the will of her husband, it is the duty of the probate judge, forthwith after the probate of the will, to issue a citation to the widow to appear and make her election, which election is required to be made within one year from the date of the service of the citation.³ The probate judge is directed to explain to the widow the provisions of the will, her rights under it, and by law, in the event of her refusal to take under the will. If she is unable to appear in court by reason of ill health, or is not a resident of the county in which the election is to be made, the probate judge is required, on application made in her behalf, to issue a commission with a copy of the will annexed, directed to any suitable person, to take the election of the widow.⁴ If she fail to make an election, she retains her dower and such share of the personal estate as she would have been entitled to by law in case her husband had died intestate leaving children.⁵ Under this statute it is not necessary that the entry of an election by a widow to take under the will of her husband should show affirmatively that the judge had made to her the explanation above required. In the absence of averment or proof to the contrary, such explanation will be presumed.⁶

25. In South Carolina, if the widow file a petition for dower, within the time allowed to make her election, this is a sufficient dissent from the will of her husband.⁷ It has also been held, that while a provision made expressly in satisfaction of dower, will, if actually received by the widow, constitute a good defence to pro-

¹ *Anderson's Appeal*, 36 Pa. St. 476.

² *Cauffman v. Cauffman*, 17 S. & R. 16; *Heron v. Hoffner*, 3 Rawle, 393, 396; *Light v. Light*, 21 Pa. St. (9 Harris), 407.

³ Act of April 2, 1858, 55 Ohio Laws, 36; 2 Swan & Critchf. p. 1623, § 43.

⁴ 2 Swan & Critchf. p. 1624, §§ 44, 45.

⁵ Act of March 10, 1860, 57 Ohio Laws, 30; 2 Swan & Critchf. p. 1623, § 44. See *Stilley v. Folger*, 14 Ohio, 610; *Thompson v. Hoop*, 6 Ohio St. 480; *Parker v. Parker*, 13 Ohio St. 95.

⁶ *Davis v. Davis*, 11 Ohio St. 386. The widow's election to take under a will, does not estop her from setting up her right as heir to the estate, or from contesting the will, and controverting the validity of devises therein; and it is not the duty of the probate judge to advise her of her rights as such heir, at the time of her election. *Carder v. Fayette Co.*, 16 Ohio St.

⁷ *Rayner v. Capehart*, 2 Hawks, 375, 377.

ceedings at law for the recovery of dower; yet, if the defence be made and overruled; or, it seems, if it be neglected to be made, and the widow recover her dower, she can not afterwards be called upon in equity to restore the provision accepted by her, nor to elect between it and her dower. In the absence of evidence of fraud or collusion, the judgment, until reversed, is binding upon the parties in interest.¹

26. In Kentucky, according to a ruling made in an early case, a widow renouncing by deed the provision made for her in the will of her husband, and claiming her dower, will not be permitted to deny her capacity when she executed the deed, nor will a stranger be permitted to call it in question.²

Implied election.

27. An election may be determined by matter *in pais*, as well as by matter of record. Considerable difficulty, however, often arises in deciding what acts of acceptance or acquiescence amount to an implied election; and this question, it seems, must be determined more upon the circumstances of each particular case, than upon any general principle.³ But it has been frequently adjudged that taking possession of property under a will, and exercising unequivocal acts of ownership over it, for a long period of time, will amount to a binding election to confirm the instrument.⁴

28. Thus, in *Upshaw v. Upshaw*,⁵ a wife was entitled to a reversion in certain slaves. The husband died before the determination of the particular estate, and devised the slaves away from the wife, and gave to her other property for life, with remainder over in fee simple. She took possession of the estate devised to her, held it for many years, and then disposed of part of it to the persons entitled to the remainder, in consideration of their enlarging her interest in the residue to a fee simple. It was held, that this amounted to an election on her part to accept the provision made in the will. In a subsequent case, determined in the same State, it was held, that if the widow enter upon and enjoy lands devised to

¹ *McDowall v. McDowall*, 1 Bailey, Eq. 324.

² *Young v. Young*, 1 A. K. Marsh. 562.

³ 1 Lead. Eq. Cas. 302, 320, and cases there cited. See post, §§ 37-43.

⁴ *Ibid.* 321; *Blunt v. Gee*, 5 Call, 481.

⁵ *Upshaw v. Upshaw*, 2 Hen. & M. 381.

her in lieu of dower, this is sufficient evidence of her election to take under the will.¹

29. In a case in Massachusetts, a testator devised to his wife the use of a part of his dwelling-house during her life, and a portion of his personal property, in lieu of dower. The widow made no demand of dower until fourteen years after the probate of the will, and in the meantime lived in the dwelling-house, received the personal property bequeathed to her, disposed of some of it, and enjoyed other provisions in the will in her favor; and more than a year before the demand of dower, a decree of the probate court was made, assigning to her by definite bounds the real estate devised to her. It was held, that it was too late for the widow to waive the devise and claim dower.² "It is true," said the court, "that in equity the widow may sometimes be relieved from an improvident election. But this can only be done where some deception or fraud was practiced upon her, or at least where she acted under an ignorance of the facts, or a misapprehension of her legal rights. But here is no evidence of any deception or misapprehension, or even ignorance of the circumstances of the case. The plaintiff chose to regard and carry into effect the provisions and directions contained in her husband's will. No desire to avoid it on her part, was known to exist till many years after the death of her husband, and not until the estate had passed from her family into the hands of strangers. We are entirely clear that she can not now change her determination, waive the provisions of the will, and claim her dower."

30. In *Delay v. Vinal*,³ a testator devised to his wife, all his property, during her widowhood, subject to his debts and the legacies bequeathed by him; and appointed her his executrix. He also authorized her, during her widowhood, to sell and convey so much of his real estate as she might judge necessary and expedient for payment of his debts, and for her support, and that of her children, and for their education. She accepted the trust of executrix and administered upon the estate. She sold, within two years, part of the real estate, under the authority in the will, and shortly afterwards married again. After her second marriage, she sold the residue of the real estate, for payment of debts, under a license of

¹ *Ambler v. Norton*, 4 Hen. & M. 23. See *Herbert v. Wren*, 7 Cranch, 370; 2 U. S. Cond. Rep. 534; Code of Va. 1849, p. 474, § 5.

² *Reed v. Dickerman*, 12 Pick. 146.

³ *Delay v. Vinal*, 1 Met. 57.

court, and executed deeds therefor, in which her husband joined, making no reservation therein of her right of dower, and being under no misapprehension concerning the condition of the estate. Thirteen years after the death of her second husband, she first claimed dower in the estate sold under the license. It was held, that she had accepted the provision made for her in the will, and that her claim to dower was thereby barred.

31. In Pennsylvania, it has been held, that where a widow with full knowledge of the value and character of her husband's estate, receives the provision made for her in his will, she can not afterwards claim that she did not intend to relinquish her dower. And it was further determined, that after seventeen years have elapsed from the time of doing such acts as usually constitute an election by a widow, it can not be denied by her that they were done in pursuance of an intention to take under the will.¹ "A widow," the court said, "who, after having become acquainted with all that is necessary for her to know in order to make a binding election, receives the gift conferred by her husband's will, and uses it as her own, is not at liberty to say she did not intend to relinquish dower. Her acts are inconsistent with any other intention. They are not equivocal. She has no right to the gift except as a legatee or devisee, and her taking and using it is an admission that she chooses to take under the will. It necessarily involves an election, and in the case supposed, a case where there is full knowledge, it bars her dower."

32. In Ohio, in a case where a testator devised real estate to his widow for life, and the remainder in fee to one of his sons, and the widow, without following the form prescribed for making her election, set up no claim for dower, but actually and in fact took under the will, and used and occupied the premises for a period of more than sixteen years, it was held that she was barred of her dower, and estopped to deny her election to take under the will.²

33. The same principle was applied in New Jersey to the case of *Stark v. Hunton*.³ There, the testator devised to his wife his tavern house and lot, and the furniture and stock in the same. The acts of the widow while in possession, treating the property as her own, altering and improving it to enhance the annual value, leasing it out for a number of years, and reserving rent to herself,

¹ *Bradford's v. Kents*, 43 Pa. St. 474.

² *Thompson v. Hoop*, 6 Ohio St. 480.

³ *Stark v. Hunton*, Saxton, Ch. 216.

were regarded as consistent only with the fact that she considered herself as holding under the will, and as amounting to an acceptance of the devise.¹

34. In South Carolina, in the case of *Caston v. Caston*,² the use and enjoyment by the widow of the property devised to her by her husband, for a period of eleven years, was held to be a sufficient indication of her election to take under the will. In *Wilson v. Hayne*,³ the widow proved the will and received the profits of the estate for five years, and this was treated as evidence that she had determined her election and relinquished her dower.

35. In *Craig v. Walthall*,⁴ decided in Virginia, a widow, having been told that a provision in her favor contained in the will of her husband, was in lieu of dower, and advised to renounce it, declined to do so; but on the contrary expressed herself satisfied with the provision, and took possession of the property devised to her, and enjoyed it for four years, and until her second marriage. It was held that she had elected to take under the will, and could not claim dower.

36. In a case in Kentucky involving a question of the character under consideration, the court said: "Whether Mrs. Hart should be deemed to have made a binding election to hold under the will, and not to assert any claim against it, is a more doubtful question. But it is our opinion that the facts, properly considered, incline strongly to the conclusion that she voluntarily and understandingly elected to approve and uphold the will in all its objects and provisions, understood as we have interpreted it. As she lived more than six years after the death of the testator, and not only never renounced the provisions of the will, but seemed to acquiesce in and hold under it, and never claimed any right to dower or distribution as a widow unprovided for by an approved will, there can be no doubt that she considered herself as a devisee."⁵

The widow must be fully informed of her rights and intend to elect.

37. It is well established, however, that no acts will be binding on the widow, unless done under a full knowledge of all the circumstances and of her rights, and with the intention of electing.

¹ See, also, *Davison v. Davison*, 3 Green (N. J.), 235.

² *Caston v. Caston*, 2 Rich. Eq. 1.

⁴ *Craig v. Walthall*, 14 Gratt. 518.

³ *Wilson v. Hayne*, 1 Chev. 2d part, 37.

⁵ *Clay v. Hart*, 7 Dana, 1, 6.

A mere acquiescence, without a deliberate and intelligent choice, will not be an election.¹ "An election by matter *in pais*," said Read, J., in *Anderson's Appeal*,² "can only be determined by plain and unequivocal acts, under a full knowledge of all the circumstances, and of the party's rights." "Nothing less than unequivocal acts," observed Strong, J., in *Bradfords v. Kents*,³ "will prove an election, and they must be acts done with the knowledge of the party's rights, as well as of the circumstances of the case. Nothing less than an act of choice intelligently done will suffice." "Where a devise to a widow is absolutely inconsistent with, and repugnant to her claim of dower," remarked the court in *Duncan v. Duncan*,⁴ "she shall be put to her election; which shall only be determined by plain and explicit acts, under a full knowledge of the circumstances of the testator, and of her own rights." "There must be some decisive act of the party," said the chancellor, in *English v. English*,⁵ "with knowledge of her situation and rights, to determine the election; or there must be an intentional acquiescence in such acts of others as are not only inconsistent with her claim of dower, but render it impossible for her to assert her claim without prejudice to the rights of innocent persons."⁶ "With regard to this doctrine of election," it is said in *O'Driscoll v. Koger*,⁷ "the court are by no means inclined to deprive a woman of her legal rights under the idea of her having made her election, merely by a bare acquiescence; but it should be made to appear that she is perfectly conscious of all her rights, and has done positive, clear acts indicative of her having made her election." There have been frequent applications of this principle, both in the English and in the American courts.

38. In *Wake v. Wake*,⁸ an annuity had been received by the widow for three years after the death of her husband, yet the court held that her right of election remained open. So in *Reynard v. Spence*,⁹ where the widow received the annuity for five years, it was held that under the circumstances she had not elected.

¹ 1 Lead. Eq. Cas. 302, 320; 1 Roper, H. & W. 600.

² *Anderson's Appeal*, 36 Pa. St. (12 Casey), 476, 496.

³ *Bradfords v. Kents*, 43 Pa. St. 474.

⁴ *Duncan v. Duncan*, 2 Yeates, 302.

⁵ *English v. English*, 2 Green, Ch. 504, 510.

⁶ Upon this last point, see *Tibbits v. Tibbits*, 19 Ves. Jr. 663.

⁷ *O'Driscoll v. Koger*, 2 Desaus. 295, 299.

⁸ *Wake v. Wake*, 1 Ves. Jr. 335.

⁹ *Reynard v. Spence*, 4 Beav. 103.

In *Butricke v. Broadhurst*,¹ Lord Thurlow, in observing upon the case of *Beaulieu v. Cardigan*,² finally decided in the House of Lords, in which the right of election continued fifty years, said, "all that was decided by the case was, that under circumstances, election may continue till the whole affair be wound up, and the trusts executed."³

39. In determining the case of *Tooke v. Hardeman*,⁴ the court said: "It is further insisted that if the widow is not barred by the statute of limitations from asserting her right to dower in this case, yet having accepted the provision made for her by the will, and acquiesced in the same since the death of the testator, she is now equitably barred from asserting her dower in the testator's estate; that she is to be considered as having made her election to accept the provisions of the will in her favor in lieu of dower. In answer to the argument of the plaintiff in error on this branch of the case, it is sufficient to say, that before any presumption of an election can arise against the widow in consequence of her acts or acquiescence, it must be shown that she was cognizant of her rights, and acted understandingly. So far from the widow being cognizant of her right to dower in the estate of her deceased husband, she expressly alleges in her answer, that she did not know she was entitled to dower, and was wholly ignorant of the law upon that subject; consequently there is no foundation for saying that she is equitably barred from asserting her legal right to dower in the lands of the testator."

40. In the case of *Dixon v. McCue*,⁵ a widow took possession of the farm of her husband, and cultivated it for the benefit of the family, according to the directions of his will, for a period of five years, and also received a bequest of property of the value of five hundred dollars, to aid her in carrying on the farm. It was shown, however, that she had fallen into a mistake in regard to her rights under the will, and it was held that she was not bound by her acts, but might still claim her dower.

41. In *Reaves v. Garrett*,⁶ a wife's separate estate, with other

¹ *Butricke v. Broadhurst*, 1 Ves. Jr. 171; 3 Bro. C. C. 88.

² *Beaulieu v. Cardigan*, 3 Bro. Parl. Ca. 277, 8v. ed.; Ambl. 533.

³ 1 Roper, H. & W. 601; 1 Bright, H. & W. 573; 1 Lead. Eq. Cas. 302. See, also, *Eloud v. Eloud*, 2 Jur. 852.

⁴ *Tooke v. Hardeman*, 7 Geo. 20.

⁵ *Dixon v. McCue*, 14 Gratt. 540.

⁶ *Reaves v. Garrett*, 34 Ala. 558.

property, was bequeathed to her by her husband, with remainder over. The widow qualified as executrix, acted in that capacity for fifteen months, treated the separate property as belonging to the estate, and on one occasion, with knowledge of her rights, declared that she intended to abide by the will. But it appeared that she had never known nor been able to ascertain, the value of the property embraced by the will. It was decided that this did not amount to a conclusive election; and the court added, that scarcely any previous acts will amount to an election, so as to prevent the party from electing finally, after the value of the estate has been ascertained.

42. Where a widow remained in the mansion-house of her husband and used property devised to her in lieu of dower, and also made a will, which is a revocable act, disposing of the property so given to her, it was held that this did not preclude her from renouncing the testamentary provision in her favor, if done in proper form and within the prescribed time.¹

43. A testator devised his real estate to his wife for life, in lieu of dower, and upon condition that she should make no claim to any property as her own out of his estate and allow all property which she had usually considered as her own private property, to be distributed as the other parts of his estate. After his death, his wife continued to reside in his house, but without setting up any claim thereto, a portion of it being occupied, with her permission, by a stranger, for five months. It was held, that these acts did not amount to an acceptance of the provision made for her in the will, she being entitled, under the statute, to continue in the occupation of the house with the heirs of her husband, so long as they did not object.²

44. But when the respective amounts of the two rights are clear, or may be easily discerned after the husband's death, the widow's acceptance of the bequests given to her, will be an irrevocable election to abide by the will, and to forego her dower.

45. Thus, in *Butricke v. Broadhurst*,³ the husband, by will, (of which he appointed his wife sole executrix) devised to trustees all his real and personal estates, in trust to permit his wife to receive the rents and profits for her life, provided she did not marry. The trustees never acted. She received the rents for five years after

¹ *McCallister v. Brand*, 11 B. Mon. 370.

² *Phelps v. Phelps*, 20 Pick. 556.

³ *Butricke v. Broadhurst*, 1 Ves. Jr. 171; 3 Bro. C. C. 88.

her husband's death, and then filed a bill claiming to elect to take an interest for life in a trust fund of 2000*l.*, under her marriage articles, instead of the property under the will, between which she was under the necessity of electing; but Lord Thurlow was of opinion that there was no foundation for the suit, observing that the widow having taken possession under the will, and the estate being a free fund from the beginning, he could not think of a principle upon which the court would say that she was then competent to elect. He further observed, and expressed his wish of being understood, that his judgment was founded upon the particular circumstance that the bill was filed without any ground, and no suggestion that the real or personal estates were in such a situation as to render it doubtful what the result would be, and consequently that the widow had laid no ground which entitled her to elect, after an acquiescence and enjoyment for five years.¹

46. It appears from this case, that the widow could not be unacquainted with the annual amount of either fund, since that under the marriage settlement was specified and certain; and she could not be ignorant of the yearly value of the rents and interest of her husband's real and personal estates, after receiving them for five years from his death. Under such circumstances, it would have been an abuse of the general principle to have extended it to such a case as the present.²

Widow not concluded by an election made under a mistake as to the condition of the estate.

47. If the election be made by the widow under the supposition that the estate devised to, and accepted by her, is free from all claims and demands, when the fact is the reverse; or if it be made before the circumstances necessary to a judicious and discriminating choice, are ascertained, then such election will not bind her, because made under a mistake, and in ignorance of the real state of the property; and under these circumstances, she will be entitled, in equity, to relief.³

¹ See, also, *Parker v. Downing*, 2 Jur. 28; *Bradfords v. Kents*, 43 Pa. St. 474.

² 1 Roper, H. & W. 601-2; 1 Bright, H. & W. 574-5.

³ 1 Lead. Eq. Cas. 302, 321; 1 Roper, H. & W. 602; 1 Bright, H. & W. 575; *Boynnton v. Boynnton*, 1 Bro. C. C. 445; *Pusey v. Desbouvrie*, 3 P. Wms. 315; *Wake v. Wake*, 3 Bro. C. C. 255; *Kidney v. Coussmaker*, 12 Ves. Jr. 136; *Dillon v. Par-*

48. In *Boynton v. Boynton*,¹ although Lady Boynton had, by her answer, elected to take her dower, instead of the benefits given to her by her husband's will, Sir Thomas Sewel, M. R., declared on the hearing, that as no account of the testator's personal estate and of his debts had been taken, she was not obliged to make any election until the account should be taken, and it should appear out of what real estate she was dowable at the time of the testator's decease; and it was referred to the master to take an account of the personal estate, and also to state out of what estate she was dowable.

49. In *Kidney v. Coussmaker*,² the husband, after marriage, purchased a freehold estate, which he limited by deed in remainder to his wife for life, after his own death; he then by his will made several devises and bequests in favor of his wife of freehold and leasehold lands, &c., expressing them to be in bar of dower, and directing her to release his trustees from it. Some of the freehold estates to which the right of dower attached were sold under the trusts of the will. When the above purchase was made, the wife considered her husband to be possessed of large property, and not otherwise indebted than in the ordinary course of business; under such impression, and the persuasion that she should enjoy the full benefits of the provisions made for her by settlement and the will, she released the trustees from her dower; and it was declared in the deed that it was not to bar or affect those provisions. The testator, her husband, was greatly involved in debt at his decease; to satisfy the whole of which it became necessary to resort to the estates devised by him to his wife; she therefore insisted, that although she had released her dower as above, yet, as she did so under the belief that she should enjoy the benefits given to her by the will and settlement, free from all claims and deductions, she was not bound by the release, but was at liberty to claim her dower, or a compensation for it, in all the freehold or customary estates of which her husband was seized of an estate of inheritance at his

ker, 1 Swanst. 381, and note; *Anderson's Appeal*, 36 Pa. St. (12 Casey), 476; *Hall v. Hall*, 2 M'Cord's Ch. 269; *Pinckney v. Pinckney*, 2 Rich. Eq. 219, 237; *Upshaw v. Upshaw*, 2 Hen. & Munf. 381, 390, 393; *Snelgrove v. Snelgrove*, 4 Desaus. 274; *United States v. Duncan*, 4 M'Lean, 99; *Adsit v. Adsit*, 2 John. Ch. 448, 451. *Contra*, *McDaniel v. Douglas*, 6 Humph. 220. See 2 Redf. on Wills, pp. 748, 754.

¹ *Boynton v. Boynton*, 1 Bro. C. C. 445.

² *Kidney v. Coussmaker*, 12 Ves. Jr. 136, 153.

death. And Sir William Grant, M. R., determined that the wife was not bound by her election, since it was made under a mistaken impression that her husband's creditors would make no claim upon the estates devised to her, and that she was therefore entitled to enforce any of her legal rights, and to an inquiry for that purpose of the estates in which she was entitled to dower.¹

50. In South Carolina, in *Snelgrove v. Snelgrove*,² the husband devised to his wife his whole real and personal estate during life. She elected to take under the will, and entered upon and enjoyed the estate devised to her. It was subsequently adjudged that the will was invalid as to the real estate; and it was determined that the wife might take the bequest of the personalty and her third part of the real estate in fee, under the statute of 1791, accounting for the rents and profits while she held the whole real estate under the will. It was also held that her representatives were entitled to exercise the same privilege. The subject was also discussed by the chancellor, in the case of *Hall v. Hall*.³ "The cases have gone so far," he said, "that after the wife has made her election, and has received benefits under the will, she has been allowed to retract and resort to her legal rights, when the estate has turned out differently from what it was believed and stated to be at the time of the election prematurely made."

51. But if the widow, at the time she makes her election to take under the will, is acquainted with the material *facts* of the case, such election will be binding, even though she do not understand her legal rights, provided no imposition is practiced upon her, or no unfair advantage taken of her ignorance of the law, and the consideration is not grossly inadequate.⁴ "If a widow who is acquainted with all the facts," said Black, Ch. J., in the case cited, "but is wholly unaware that by law she has a right of dower, is induced by one who knows the law, and at the same time knows her ignorance of it, to release or assign it for a totally inadequate consideration, she ought to be relieved."⁵ But where the error is her own, and no imposition has been practiced, nor any fraudulent

¹ 1 Roper, H. & W. 602; 1 Bright, H. & W. 575.

² *Snelgrove v. Snelgrove*, 4 Desaus. 274.

³ *Hall v. Hall*, 2 McCord's Ch. 269, 280.

⁴ *Light v. Light*, 21 Pa. St. (9 Harris), 407. See, however, *Tooke v. Hardeman*, Geo. 20; ante, § 39.

⁵ Post, §§ 54, 55.

advantage taken, her acts done under the influence of it are as binding upon her as if she knew the law perfectly. It is not pretended in this case that the demandant's mistake of the law (if she made one) was caused by the defendant or by the executors of her husband, or by any person interested in the estate; nor is it asserted that they had any more knowledge of the subject than she had. That she was not ignorant of any material fact, is conclusively established by the verdict." It was held in the same case, that an error in the amount of the personal estate, neutralized, however, by about an equal increase of the debts, is immaterial as to the effect of the election.

52. In Tennessee, the general rule upon this subject has been departed from, and it is there held that a widow who has elected to take under the will, can have no relief against a mistake as to the adequacy of the estate to meet the charge made upon it in her favor, unless her acceptance was procured by fraud.¹ "The statute," said the court in the case referred to, "gives her six months to examine, to inquire, to consult friends; and if, without fraud and imposition she elects not to dissent, there is no principle upon which, against the express letter and obvious policy of the statute, she can claim to be thrown back upon her dower right. She may, in every instance, if she will, be upon safe ground, and dissent from the will, and so have her dower, free from debts resting upon the estate; but, if tempted by the apparently greater provision made for her on the face of the will, she abandons this safe ground, and declines to dissent, she must not, if the experiment turn out badly, expect the court to replace her upon her dower right. We know not upon what safe principle this could be done, and if the statute be departed from, at what indefinite period the widow might resume her claim to dower. If bank stock be given her, the bank may become broken; if debts be bequeathed, the debtors may become insolvent; slaves may die; steamboats explode; an ample provision in personal property may be swept away, because the testator, surety to a large amount for very wealthy men, may have forgotten the matter; but misfortunes in trade, or the hazard of the gaming table, may reduce them to beggary, and throw the liability solely upon the estate; shall the widow then come back and take her dower? These are contingencies to be thought of by her, in determining

¹ *McDaniel v. Douglas*, 6 Humph. 220. But see post, § 58.

whether the provisions of the will be satisfactory to her, and before she steps off from the safe and solid ground of her dower, to take under the will."

53. It is held in Ohio, that an election formally made and entered upon the journal of the probate court at the instance of the widow, can not afterwards, and within the time allowed her for making it, be set aside by her at pleasure. Nor has the probate judge any authority to cancel an election previously made and entered, for an alleged mistake of the widow, as to the provisions and effect of the will. The election, when made and recorded, can be vacated only on petition in a court having general equity jurisdiction.¹

An election induced by fraud is not binding upon the widow.

54. If, by means of fraud and imposition practiced upon her, a widow is induced to make an election contrary to her true interests, and different from what she would otherwise have done, a court of equity will afford her proper relief.² If she be prevented by fraud from renouncing her husband's will within the time required by law, she will be placed, in equity, in the same situation in all respects, as if she had dissented in time. An instance of the application of this principle occurred in *Smart v. Waterhouse*.³ There, the widow intended to dissent from her husband's will; but the executor represented to her that it would produce great confusion in the estate; that her distributive share was about five thousand dollars, and that if she did not dissent she would be paid that amount; in consequence of which she did not dissent. The executor, at the time he made these representations, knew, or from his situation had the means of knowing, that her share would be double that amount. It was held that this was a fraud upon the widow, and that a court of equity would grant her relief.

55. The rule is the same where the widow has been led, either by fraudulent misrepresentations or an unfair concealment of material facts, to renounce the provisions of the will. In *Morrison v. Morrison*,⁴ a widow, having renounced the provision made for

¹ *Davis v. Davis*, 11 Ohio St. 386.

² *Smart v. Waterhouse*, 10 Yerg. 94; *McDaniel v. Douglas*, 6 Humph. 220; *Morrison v. Morrison*, 2 Dana, 13; *Light v. Light*, 21 Pa. St. (9 Harris), 407. See *Reed v. Dickerman*, 12 Pick. 146, 151.

³ *Smart v. Waterhouse*, 10 Yerg. 94.

⁴ *Morrison v. Morrison*, 2 Dana, 13.

her by the will of her deceased husband, united in a bill with some of his children for a settlement and distribution of the personal estate, and also claiming dower in certain slaves which her husband had sold and conveyed during his last illness to his brother. She alleged that these slaves were all that her husband owned; that their sale and conveyance were secretly made and purposely concealed from her, until after she had made her renunciation of the will, and were then immediately taken into possession by the brother; that previous to her renunciation, she had consulted with him, whether she ought to renounce or not; that he advised her to do it, and made a calculation of the value of her third of the slaves, to prove to her that such was her interest. In his answer, the brother admitted that the conveyance to him was secretly made, and stated that it was concealed from the widow during her husband's life, at the particular request of the latter. He further admitted that he staid one night at the house of the complainant, between the time of the death of her husband and her renunciation; that while there she consulted with him whether she ought to renounce, and that he did not disclose to her his purchase of the slaves. He denied that he advised her to make the renunciation, or made a calculation showing that it would be to her interest; on the contrary, he averred that he expressly declined giving her any advice on that subject, and referred her to her father, as the more proper and equally competent person to give her advice. The court said: "We think his own admissions entitle her to the relief prayed against him. It is not necessary to the case that he should actually have given the advice. The law, equally with morality, requires that he should have disclosed his title to the slaves, as well as forbore to give such advice. Every principle of ethics and of law that requires the forbearance of the one, equally enjoins the performance of the other. The one was as much calculated to deceive and produce the injury which ensued as the other. No blameless motive can be presumed for his failure to disclose his title, when he knew that the possession of that information was indispensable to her, in order to attain a correct conclusion as to her true interest on the subject about which she was consulting him. Even the alleged motive for the original concealment had ceased with her husband's death. None can be imagined for continuing it afterwards, but that of thereby tempting her to commit the act she did, to her own prejudice, through ignorance of the sale to him. He

knew she was in error on that subject, and supposed the slaves liable to her dower claim. His failure to undeceive her could only have resulted from a desire on his part that she should injure herself by making the renunciation. The obligation on him to make the disclosure was the more imperative, because he had been a participant in the original arrangement by which the sale had been made in secret, and purposely concealed from her."

Remedy of the widow where she has been deprived of the provision given in lieu of dower.

56. By statute in Massachusetts, if the widow be deprived of the provision given her by will, she is entitled to demand her dower in the same manner as if no such provision had been made.¹ Like enactments are in force in Maine,² Michigan,³ Wisconsin,⁴ Minnesota,⁵ Oregon,⁶ Vermont,⁷ Rhode Island,⁸ Virginia,⁹ Missouri,¹⁰ Kansas,¹¹ and Indiana.¹² Under these statutes, the widow is entitled to be endowed if the property of the testator be required for the payment of his debts.¹³ Nor is it necessary that the deprivation should be total; it is sufficient if it be of a substantial part.¹⁴ And in such case she is entitled to be endowed as well where the provision is by devise of all the testator's property, on condition that she pay all his debts and legacies, as where it is by bequest of a certain sum of money, or of specific property.¹⁵ Nor does it make any difference that a previous application for dower had been made and refused before there was sufficient evidence that the widow would be deprived of the provision in the will.¹⁶ Whether, in case of a failure of the testamentary provision made for her, the widow is entitled to dower, if, before the expiration of the time allowed for making an election she is advised of such failure, and neglects to claim dower within that period, is a question that does not appear to have been determined.¹⁷

¹ Gen. Stat. Mass. ch. 90, § 13.

² 2 Comp. Laws Mich., p. 853, § 20.

³ Stat. Minn. 1858, p. 409, § 20.

⁴ Gen. Stat. Verm., p. 413, § 11.

⁵ Code Va. 1849, p. 475, § 6.

⁶ 1 Rev. Stat. Misso. 1855, p. 672, § 13.

⁷ 1 Ind. Rev. Stat. 1852, p. 255, § 42.

⁸ Hastings v. Clifford, 32 Maine, 132.

⁹ Ibid.

¹⁰ Rev. Stat. Maine, 1857, ch. 103, § 13.

¹¹ Rev. Stat. Wis. 1858, p. 548, § 20.

¹² Stat. Oregon, 1855, p. 407, § 20.

¹³ Rev. Stat. R. I. 1857, p. 506, § 23.

¹⁴ 1 Rev. Stat. Misso. 1855, p. 672, § 13.

¹⁵ Thompson v. McGaw, 1 Met. 66.

¹⁶ Thompson v. McGaw, 1 Met. 66.

¹⁷ See Hastings v. Clifford, 32 Maine, 132.

57. In New Jersey, if the widow, without fault on her part, be evicted by title paramount, or by legal sale for the payment of debts, from premises devised to her in lieu of dower, she will be remitted to her rights under the law.¹ In Iowa, she is entitled to her rights under the law where the title to the property devised to her fails.² So, in South Carolina, a widow taking a legacy and waiving dower, may again set up her claim to dower, if the debts take away the legacy.³ By the Maryland statute of 1798,⁴ a widow may become entitled to dower, after having accepted a devise in lieu of that right, provided nothing passes by such devise. But a partial failure of the devise will not entitle her to compensation out of the residue of the estate, unless the failure is to such an extent as to make what she receives less in value than her share under the law.⁵ Where a testator devised land which he had previously mortgaged, and charged it in the hands of the devisee with a provision for his wife in lieu of dower, which provision the widow accepted, and the land was afterwards sold to pay the mortgage debt, it was held that she had a preferred claim upon the surplus proceeds of sale as against the devisee, but that she had no claim against the mortgagee.⁶

58. In Kentucky, if the widow is lawfully deprived of her jointure, or any part thereof, she may have indemnity therefor by way of dower or damages out of her husband's estate.⁷ In Tennessee, if a provision of personal estate is made for her, but the whole of the husband's property, including the bequest, is taken for the payment of his debts, she may, without any formal dissent, sue for dower.⁸ In New York, it has been held, that if part of the provisions made by a testator are declared void, the widow is not bound by a previous election to receive such provisions except as against *bonâ fide* purchasers or mortgagees; still, she may, if she will, accept the residue in lieu of her dower.⁹

¹ Thompson v. Egbert, 2 Harris. 459.

² Corriell v. Ham, 2 Clarke (Iowa), 552.

³ Gist v. Cattell, 2 Desaus. 53.

⁴ Ch. 101, sub ch. 13.

⁵ Chew v. Farmers Bank, 9 Gill, 361; Thomas v. Wood, 1 Md. Ch. Dec. 296.

⁶ Chew v. Farmers Bank, 9 Gill, 361.

⁷ 2 Rev. Stat. Ky. by Stanton, p. 26, § 8. See Stevens v. Terrel, 3 Mon. 133.

⁸ Code Tenn. 1858, § 2404.

⁹ Hone v. Van Schaick, 7 Paige, 221; affirmed in 20 Wend. 564. See ante, ch. xv., §§ 82-89.

A widow taking a testamentary provision in lieu of dower is regarded as a purchaser for a valuable consideration.

59. A bequest in lieu of dower, accepted by election, is so far based upon a valuable consideration, that, though subject to the demands of creditors, it has priority over other legacies, and will not abate with them.¹ The reason upon which this rule is founded, is thus stated: "It is the price put by the testator himself upon that right, and which she is at liberty to accept. Her relinquishment of dower forms a valuable consideration for the testamentary gifts. In this point of view, she becomes a purchaser of the property left to her by the will. So, on the other hand, the husband offers a price for his wife's legal right of dower which he proposes to extinguish; and if she agrees to the terms, she relinquishes it and is entitled to the price. It is, therefore, a matter of convention or contract between them; and what she thus becomes entitled to receive is not by way of bounty, like other general bequests; but as purchase-money for what she relinquishes, and which, consequently, must be paid in preference to other legacies, they being merely voluntary."²

60. In a case in Virginia, where a life estate in lands had been devised to the widow in lieu of dower, and the life estate was of less value than her dower would have been, it was held that the former could not be subjected to the burden of paying any part of the debts.³

61. In Maryland⁴ and Mississippi,⁵ it is provided by statute, that

¹ 1 Lead. Eq. Cas. 320; 1 Roper on Legacies, 432; *Burridge v. Bradyl*, 1 P. Wms. 127; *Blower v. Morret*, 2 Ves. Sen. 420; *Davenport v. Fletcher*, Ambl. 244; *Heath v. Dendy*, 1 Russ. 543; *Norcott v. Gordon*, 14 Sim. (37 Eng. Ch.) 258; *Williamson v. Williamson*, 6 Paige, 298; *Isenhardt v. Brown*, 1 Edw. Ch. 411; *Hubbard v. Hubbard*, 6 Met. 50; *Pollard v. Pollard*, 1 Allen, 490; *Reed v. Reed*, 9 Watts, 263; *Lord v. Lord*, 23 Conn. 327; *Loock v. Clarkson*, 1 Desaus. 471; *Stuart v. Carson*, Ibid. 500; *Gibson v. McCormick*, 10 Gill & J. 65, 113; *Thomas v. Wood*, 1 Md. Ch. Dec. 296; *Collins v. Carman*, 5 Md. 503; *Bowie v. Berry*, 3 Md. Ch. Dec. 359; *Hall's case*, 1 Bland, Ch. 203; *Gaw v. Huffman*, 12 Gratt. 628. *Contra*, *Chambers v. Davis*, 15 B. Mon. 522.

² By the vice chancellor, in *Isenhardt v. Brown*, 1 Edw. Ch. 411, 413.

³ *Gaw v. Huffman*, 12 Gratt. 628.

⁴ Act of 1798, ch. 101, sub ch. 13, § 5; 1 Md. Code, p. 682, § 288; *Gibson v. McCormick*, 10 Gill & J. 65, 113; *Thomas v. Wood*, 1 Md. Ch. Dec. 296; *Bowie v. Berry*, 3 Md. Ch. Dec. 359; *Hall's case*, 1 Bland, Ch. 203; *Collins v. Carman*, 5 Md. 503.

⁵ Rev. Code Missis. 1857, p. 469, art. 70.

a widow accepting or abiding by a devise in lieu of her legal right, shall be considered as a purchaser for a fair consideration. And it is held, that where such a provision has been accepted, the court, in decreeing a sale of the property for the payment of the testator's debts, should order it to be made subject to the devise to the widow, unless it is shown that the provision in her favor exceeds her common law right, and is therefore injurious and unjust to creditors.¹ The rule is, that she is to be considered a purchaser of the devise, to the extent of the value of her share or legal right.²

62. In New Jersey, if the wife have no inchoate right of dower at the time her husband makes his will, or afterwards, a legacy given in lieu of dower will abate in proportion to other legacies.³ And the fact that she had no such right may be shown by evidence.⁴ And it has been held in the same State, in a case where a legacy coupled with a devise of real estate was given to a widow in lieu of dower, that her acceptance of the provision did not create an equity in her favor to charge her legacy on the land against other devisees.⁵

63. By the North Carolina statute, it is declared that a widow claiming under her husband's will, shall, in relation to creditors, be considered as a legatee; and she is required to refund to the executor or administrator her rateable part of the debts and demands, the same as other legatees.⁶

64. In Kentucky, it has been held, that when a widow takes the estate of her husband under his will, she holds as devisee merely, and derives no right as widow, although taking under the devise may have the effect to bar her claim to dower.⁷ In the case referred to, the widow was compelled to contribute from the property devised to her, to the payment of the debts of the testator. But in a more recent case it was determined, that under the statute now in force in that State,⁸ a legacy to the wife, by way of jointure, is, upon a deficiency of assets to pay all the legacies, entitled to priority of payment over the general legatees.⁹

¹ *Gibson v. McCormick*, 10 Gill & J. 65, 113.

² *Thomas v. Wood*, 1 Md. Ch. Dec. 296; *Hall's case*, 1 Bland, Ch. 203.

³ *Perrine v. Perrine*, 1 Halst. 133.

⁴ *Ibid.*

⁵ *Paxson v. Potts*, 2 Green, Ch. 313.

⁶ *Rev. Code, N. C. 1855*, p. 603, § 14.

⁷ *Chambers v. Davis*, 15 B. Mon. 522.

⁸ *See ante*, § 58.

⁹ *Tevis v. McCreary*, 3 Met. (Ky.) 151.

CHAPTER XVIII.

ELOPEMENT AND ADULTERY OF THE WIFE AS A BAR OF DOWER.

1. By the statute 13 Edward I., ch. 34, (commonly called the Statute of Westminster Second), it is enacted, that if a wife elope from her husband and continue with an adulterer, she shall be barred of her dower, unless her husband willingly, and without coercion of the church, reconcile her, and suffer her to dwell with him. "*Si uxor sponte reliquerit virum suum, et abierit, et moretur cum adultero suo, amittat in perpetuum actionem petendi dotem suam, nisi vir suus sponte, et absque coërcione ecclesiasticâ, eam reconciliet et secum cohabitare permittat.*"¹ At common law, elopement and adultery of the wife did not operate as a bar of dower.²

2. In order to create a forfeiture of dower under this statute, the act of the wife in leaving her husband and cohabiting with another man, must be entirely voluntary. Therefore, if the relatives of the husband detain him from his wife, so that she is ignorant of what is become of him, and they pretend that he is dead, and procure her to release all marriages and interests that she may have in him, and moreover persuade and induce her to marry again, she having no notice of her husband being alive; although the man with whom she cohabits have notice of her husband being living, and although she in truth lives in adultery with such man, she will not forfeit her dower; because *non reliquit virum sponte*, as mentioned in the statute.³

3. So if the wife be forcibly taken away from her husband, and continue with the man against her will, her right to dower will not be forfeited.⁴ "If a woman be ravished, and remain with the ravisher against her will, she shall not lose her dower."⁵ But although taken away by force, if she afterwards voluntarily remain

¹ 1 Inst. 435; Park, Dow. 223.

² 1 Inst. § 36; 2 Inst. 435; Hethrington v. Graham, 6 Bing. 135; 19 Eng. C. L. 31. Mere adultery is no bar in equity to a bill for dower. Seagrave v. Seagrave, 13 Ves. Jr. 439. See Park, Dow. 20, note, and 1 Bright, H. & W. p. 362, pl. 4.

³ Green v. Harvy, 9 Vin. Ab. 241, pl. 9; s. c. 9 Roll. Ab. 680, pl. 9; 1 Bright, H. & W. 540; Park, Dow. 225-6.

⁴ Co. Litt. 32 b.; Perk. § 354.

⁵ Perk. § 354.

with the adulterer, she will be barred of her dower.¹ In commenting upon the terms *si sponte reliquerit, et abierit, et moretur cum adultero*, Lord Coke observes:² "Albeit, the words of this branch be in the conjunctive, yet if the woman be taken away, not *sponte*, but against her will, and after consent, and remain with the adulterer without being reconciled, she shall lose her dower; for the cause of the bar of her dower is not the manner of the going away, but the remaining with the adulterer in avowtry without reconciliation."

4. If, after such voluntary residence, the wife be detained against her will; or if she leave the adulterer, or he turn her away, and her husband be not voluntarily reconciled to her, she will, in all such cases, be excluded from dower.³ "Albeit," says Lord Coke,⁴ "she doth not continually remain in avowtry with the adulterer, yet if she be with him and commit adultery, it is a tarrying within this statute. Also, if she once remain with the adulterer in avowtry, and after he keepeth her against her will; or if the avowterer turn her away, yet she shall be said *morari cum adultero* within this Act."⁵

5. Whether the wife leave her husband with or without his consent, and live in adultery, she will, nevertheless, forfeit her dower, if there be no subsequent reconciliation between them.⁶ Thus, in *Coot v. Berty*,⁷ the defendant in error pleaded elopement of the wife, who replied that her husband bargained and sold her to the adulterer. The replication was held to be bad, for the license of the husband to his wife's adultery could not be pleaded in bar to an action of trespass brought by him, although it might be insisted upon in mitigation of damages.⁸

¹ Co. Litt. 32 b.; 2 Inst. 435.

² 2 Inst. 435.

³ Co. Litt. 32 b.; Perk. § 354.

⁴ 2 Inst. 436.

⁵ "All which is comprehended shortly in two hexameters:

"Sponte virum mulier fugiens, et adultera facta,
Dote suâ careat, nisi sponsi sponte retracta."

Co. Litt. 32 b.

⁶ 2 Inst. 435-6; Harg. Co. Litt. 32 a., note (10).

⁷ *Coot v. Berty*, 12 Mod. 232; Rep. temp. Holt, 232.

⁸ 1 Bright, H. & W. 539; 2 Crabb, R. P. § 1189; Park, Dow. 224. See, also, Paynel's case, 2 Inst. 435; 2 Hargr. Co. Litt. 32 a., note (10), in which the husband, by deed under seal, granted his wife to a stranger. It was ruled, 1. That this was a void grant; 2. That it did not amount to a license, or at least, was a void license; 3. That after elopement there shall not be any averment *quod non fuit adulterium*, though William and Mary after the death of John (the husband), intermarried. The case is set out at length in 2 Inst. 435-6. See, also, Dyer, 106 b., note, where a translation of the deed is given.

6. So, adultery is a bar to dower, although committed after the husband and wife have separated by mutual consent.¹ "It is contended on the part of the demandant," said Tindal, Ch. J., in his opinion in the case cited, "that each part of the description of the offence contained in the Act must be taken to be cumulative; so that the dower is not barred unless the wife has left her husband willingly with the adulterer; has gone away with him, and has also continued with him. Whilst on the part of the tenant, it is insisted, that it is sufficient to bring the case within the statute if she has of her own consent left the society of her husband, and after she has so left him, committed the act of adultery; and the court is of the latter opinion. It may be admitted, as the fact is, that in all the ancient precedents the leaving of the husband by the wife, is stated to have been 'with the adulterer.'² But we think this is not conclusive on the point; for, as there can be no doubt that the case is within the statute where all these circumstances concur, so the pleader would of course insert them where the facts of the particular case warranted the insertion. And, on the contrary, there is direct authority that all the circumstances mentioned in the statute need not concur in form provided they do so in substance.³ . . . And this appears more evident by the case of Sir John Camoys, cited in 2 Inst. 467, where the plea states that the wife left her husband in his life, and lived as an adulteress with Sir W. Paynel, and the replication took issue that she did not live as an adulteress with the said Sir W. P., wherein the bar was held good, though there was no allegation that she left with the adulterer; and it ought not to be forgotten that Britton, whose book was published immediately after the framing of this statute, speaking of a writ of dower brought against the heir and his guardian, says: 'He may say she hath forfeited dower of her husband by her adultery; for she went from her husband to another bed after she had married him, and so forfeited her dower.' Now here no mention is made of a leaving of the husband, either willingly, or with any particular person, but the plea states only in substance that the wife was living apart from her husband in adultery. The authorities, therefore, above referred to, place the forfeiture of the dower upon the fact of a living from the husband in adultery, and not upon the

¹ *Hethrington v. Graham*, 6 Bing. 135; 19 Eng. C. L. 31.

² See Lib. Intratumum, fo. 20; Rastal, 230; Dyer, 107. ³ 2 Inst. 435; ante, § 3.

circumstances attending the elopement; and as we think the good sense and reason of the case concur with these authorities, we hold the proper construction of the statute to be what the words still will warrant, that if a woman leaves her husband with her own free will, and afterwards lives in adultery, the dower is forfeited." And in quite a recent English case, after a full review of the authorities, it was held, that a woman forfeits her dower under the statute, by adultery without reconciliation, though she originally departed from her husband's house in consequence of his cruelty.¹

7. But it seems there must be a going away in some sense, for it is said that if the wife remain in adultery upon an estate belonging to her husband, this is not an elopement, and therefore does not fall within the statute.² So, if the lands were of the joint purchase of the husband and wife; "because the husband is to see that none such live within his land;"³ or though the wife live within the house of a free tenant of the manor which is her husband's.⁴ And upon this subject, Perkins has the following observations:⁵ "If a man seized of two manors in fee take a wife, and when he is dwelling in one manor, the wife goes to the other manor, and when she is there lives in adultery, it is said that by doing so she shall not lose her dower; because it can not be intended an elopement from her husband, for she resides in the proper manor of her husband, when the law can not intend that she can dwell upon the manor of her husband without his agreement." He adds, however, "*tamen quære.*"

8. Lord Coke, in discussing this point, maintains that if the wife leave her husband's house of habitation it is an elopement within the statute.⁶ "Though she remain with the avowterer in any of the lands or manors of her husband," he observes, "yet she shall be barred of her dower by this branch, without the husband's free reconciliation, albeit it hath been otherwise holden; and the reason that they yielded, is because it is no elopement, whereas it appeareth before that that the words of *reliquerit & abierit* are not of the substance of the bar of dower, but the adultery, and the remaining with the adulterer, as is above said; and albeit she and the adulterer remain within any of the lands or manors of the husband, yet (the

¹ Woodward v. Dowse, 10 C. B. (N. S.), 722.

² Fitzh. N. B. 150, H.; Gilb. Dow. 402; Perk. § 355; 9 Vin. Ab. 242, pl. 11, 12; Park, Dow. 224; 2 Crabb, R. P. § 1191; 1 Bright, H. & W. 539.

³ 8 Edw. II. Dow. 153, adjudged; Park, Dow. 224.

⁴ Ibid.

⁵ Perk. § 355.

⁶ 2 Inst. 436.

words being *si uxor sponte reliquerit & abierit*) she hath left and gone from her husband in that case, which is a personal offence.”¹

9. The statute of Westminster second has been substantially re-enacted in New Jersey,² Virginia,³ Ohio,⁴ Illinois,⁵ Missouri,⁶ North Carolina,⁷ South Carolina,⁸ Kentucky,⁹ Delaware,¹⁰ and Kansas;¹¹ and it seems to have been recognized as a part of the American common law in some of the States where no such re-enactment has been made in terms.¹² In Connecticut, it is necessarily implied in the statute, which gives dower to the wife only who lived with the husband at the time of his death, or was “absent from him by his consent, or by his default, or by inevitable accident.”¹³ In Indiana, if a wife leave her husband, and be living in adultery at the time of his death, she is entitled to no part of his estate.¹⁴ In New York, the English statute was in substance re-enacted in 1787;¹⁵ it remained in force down to the revision of the laws in 1830, when it was repealed; and now by the revised statutes, dower is not barred by the elopement and adultery of the wife, unless the marriage contract has been dissolved by divorce.¹⁶ Nor

¹ By the Scotch law, adultery is a forfeiture of dower, if the husband adopted any proceedings at law evincive of his intent to that effect, or of his offence against her; and this whether she eloped or not. 1 Stair's Inst. 39 (n.) 321; 1 Greenl. Cruise, 199, note.

² Elmer's Dig., p. 145; Nixon's Dig., p. 210, §§ 14, 15.

³ Code Va. 1849, p. 475, § 7; Act of 1785, 12 Hen. 164; Stegall v. Stegall, 2 Brock. 256.

⁴ 1 Rev. Stat. Ohio, p. 520, § 6.

⁵ 1 Stat. Ill. 1858, p. 153, § 13. This statute bars the wife if she voluntarily leave her husband and commit adultery.

⁶ 1 Rev. Stat. Misso. 1855, p. 672, § 20. But prior to 1825 the statute was not in force in Missouri. Lecompte v. Wash, 9 Misso. 551.

⁷ Rev. Code N. C. 1855, p. 603, § 11; Walters v. Jordan, 13 Ired. L. 361.

⁸ Act of 1712, 2 Stat. S. C., p. 422.

⁹ 2 Rev. Stat. Ky. by Stanton, p. 24, § 4. See 1 Rev. Stat., p. 426, § 15.

¹⁰ Del. Rev. Code, 1852, p. 291, § 9. ¹¹ Comp. Laws Kansas, 1862, p. 480, § 15.

¹² 1 Washb. R. P. 197; 1 Greenl. Cruise, 199, note; 4 Dane, Ab. 676; 4 Kent, 53; Bell v. Nealy, 1 Bailey, 312; Cogswell v. Tibbetts, 3 N. H. 41.

¹³ Comp. Stat. Conn. 1854, p. 382; 1 Greenl. Cruise, 199, note. See, also, Gen. Stat. Verm. ch. 55, § 1; Thayer v. Thayer, 14 Verm. 107.

¹⁴ 1 Ind. Rev. Stat. 1852, p. 253, § 32. But a single act is not “a living in adultery” within the meaning of the statute. Gaylor v. McHenry, 15 Ind. 383.

¹⁵ 1 Greenl. 294, § 7; 1 Rev. Laws, 1801, p. 53.

¹⁶ 1 N. Y. Rev. Stat. 741, § 8; Reynolds v. Reynolds, 24 Wend. 193; Cooper v. Whitney, 3 Hill, 95. A divorce obtained by collusion or fraud will be set aside, even though followed by the marriage of the successful party. Singer v. Singer, 41 Barb. 139. So a divorce may be vacated for irregularity affecting the jurisdiction of the person. Wortman v. Wortman, 17 Abb. Pr. R. 66.

will the claim to dower be defeated by the fact, that prior to the adoption of the revised statutes, the wife abandoned her husband, and for many years lived in open adultery away from him, if the death of the husband occurred after those statutes went into operation.¹ It is held in Massachusetts² and Rhode Island,³ that the statute of Westminster Second is not in force in those States. In Maryland, on conviction of bigamy, the woman convicted forfeits her dower in the estate of her first husband.⁴

10. The Virginia statute contained in the revision of 1819, is in these words: "If a wife willingly leave her husband and go away and continue with her adulterer, she shall be barred for ever of action to demand her dower that she ought to have of her husband's lands, if she be convicted thereupon, except," &c.⁵ In *Stegall v. Stegall*,⁶ which arose under this enactment, a separation had occurred between husband and wife in consequence of the refusal of the wife to accompany her husband to his place of abode. The wife excused herself for the refusal upon the ground that her husband was supposed to be married to another woman, and her parents would not permit her to go with him. After the separation, she contracted a second marriage, and lived and cohabited with her second husband for several years. Upon a bill filed by her for dower in the estate of the first husband, Marshall, Ch. J., after referring to the statute above quoted, said: "So far as respects that part of the provision which relates to the wife's willingly leaving her husband, I think it is satisfied by any separation which is voluntary on her part; and I think any separation voluntary which is not brought about by his act or by any restraint on her person. In this case, it does not appear that her person was restrained, and the authority of her parents ceased on her marriage. Her husband wished her to accompany him, and she refused. The separation must therefore be considered as voluntary on her part. The report that he was married with another woman does not justify her refusal to accompany him, because it was not true, in fact, and she ought not to have acted upon it. But if his real situation was such as to

¹ *Reynolds v. Reynolds*, 24 Wend. 193; *Cooper v. Whitney*, 3 Hill, 95.

² *Lakin v. Lakin*, 2 Allen, 45.

³ *Bryan v. Batcheller*, 6 R. I. 543.

⁴ 1 Md. Code, p. 207, § 11.

⁵ 1 Rev. Code, 1819, ch. 107, § 10. The present statute differs in phraseology from the one above quoted, but is substantially the same. Code Va. 1849, p. 475, § 7.

⁶ *Stegall v. Stegall*, 2 Brock. 256.

justify separation, it could not justify her subsequent conduct. That was incompatible with the continuance of her claims on him as a husband.

11. "The words, 'and go away and continue with her adulterer,' " the chief justice continued, "would, I am much inclined to think, be satisfied by an open state of adultery, whether the woman resided in the same house with her adulterer, or in separate houses; whether in her own or a friend's house, or in his; whether with or without the ceremony of marriage, which, in this case, is absolutely void; and which, if performed in the belief that her marriage with Stegall was a nullity, may justify that act in her own conscience, but can not justify her claim to dower in Stegall's estate. I think it perfectly clear that she is not entitled to dower in his lands."

12. Under the North Carolina statute,¹ barring the claim of the adulteress for dower, "if she willingly leave her husband and go away and continue with her adulterer," it is held, that although the wife do not continuously remain in adultery with the adulterer, yet if she be with him, and commit adultery, it is a "continuing" within the statute; and if she once remain with him in adultery, and he afterwards keep her against her will; or if he turn her away, she shall still be said "to continue" with him within the statute.² It is not necessary that there should be any adultery before the wife leaves her husband, nor an elopement with the man with whom she afterwards commits adultery; but she is barred by adultery committed with any person after she has willingly left her husband.³ But in order to defeat a claim to dower under this statute, it must appear that the wife voluntarily left her husband. If driven away by him, or by his compulsion, she does not forfeit her dower.⁴

13. In South Carolina, it is held, that if the wife leave her husband by compulsion, but refuse to return on his offer to take

¹ Rev. Stat. N. C., ch. 121, § 11.

² *Walters v. Jordan*, 13 Ired. L. 361. See ante, § 4.

³ *Walters v. Jordan*, 13 Ired. L. 361.

⁴ *Ibid.* In this case, the wife had become *enciente*, as the husband had good reason to believe, by a negro, and he compelled her to leave his house. She afterwards continued her adulterous intercourse with the negro; but the court held, that as she had not left her husband voluntarily, but on his compulsion, the case did not come within the statute. Pearson, J., dissented, holding that as the cause of her expulsion was her adultery, and she had continued in adultery afterwards, she was not entitled to dower. In this he appears to be supported by the authorities. See *Govier v. Hancock*, 6 Term, 603; *Woodward v. Dowse*, cited ante, § 6.

her back, and afterwards live in adultery, she is barred of her dower.¹

14. It has been decided in New Hampshire, in accordance with the weight of the English authorities,² that a wife does not forfeit her dower by committing adultery upon the premises of her husband.³ "Upon looking into the plea in the present case," the court observed, "we find that it is alleged that the demandant committed adultery on a particular day, and thereafterwards lived in adultery, during the life of her late husband, he, her late husband being absent on a voyage to Europe; but there is no allegation that she left her husband, and departed and dwelt with the adulterer. Notwithstanding anything alleged in this plea, she may have continued to reside in the family of her late husband during the whole time mentioned in the plea; and however gross her conduct there may have been during the absence of her husband, it is very clear it does not amount to an elopement."

15. The fact of elopement and adultery may be shown upon the trial in an action by the wife for the recovery of her dower.⁴ But in such action, if the adultery of the demandant be relied upon as a bar to her claim, the tenant is bound to prove the fact affirmatively.⁵ Proof of the second marriage of the demandant within three years after her first husband left home, but after there was a reputation in the family of his death, without showing that he was then alive, is not sufficient evidence that she was guilty of adultery.⁶

16. We have seen that by the statute of Westminster Second, if the husband, after the wife has been guilty of infidelity within the terms of the Act, become reconciled to her, and suffer her to live with him, she shall be restored to her dower.⁷ But in order to have this effect, the reconciliation must be voluntary, and without the coercion of the ecclesiastical courts.⁸

17. According to Lord Coke, cohabitation alone is not sufficient to prove a voluntary reconciliation by the husband. "Cohabitation," he says, "is not sufficient without reconciliation made by the husband *sponte*, so as cohabitation only in the same house with

¹ Bell v. Nealy, 1 Bail. 312.

² See ante, §§ 7, 8.

³ Cogswell v. Tibbetts, 3 N. H. 41.

⁴ Tud. Cas. 51; 1 Washb. R. P. 196, pl. 4; Bell v. Nealy, 1 Bail. 312.

⁵ Cochrane v. Libby, 18 Maine (6 Shepl.), 39.

⁶ Ibid.

⁷ Ante, § 1.

⁸ Co. Litt. 32 b.; 2 Inst. 436; Perk. § 354.

her husband availeth her not.”¹ It seems to be established, however, that cohabitation of husband and wife, after the elopement, without compulsion, is sufficient evidence of reconciliation.²

18. If elopement be pleaded in bar of dower, and issue be joined upon a reconciliation, the defendant will not be permitted to prove any other elopement besides that mentioned in the plea; because there might have been many elopements of the wife and subsequent reconciliations, and the demandant can only be prepared to support her replication of a reconciliation after the particular elopement specified in the defendant’s plea.³

19. The husband will not be obliged to take his wife back again, after she has eloped from him and committed adultery.⁴

20. If, during the elopement the husband purchase lands and alien them, or sell those of which he was seized at the time of his wife’s leaving him, and he afterwards become reconciled to her, she will be entitled to dower of all such lands.⁵

¹ 2 Inst. 436.

² *Haworth v. Herbert*, Dyer, 106 b; 1 Roll. Ab. 680, pl. 10; Park, Dow. 225; 1 Bright, H. & W. 541, pl. 16; 2 Crabb, R. P. § 1189. See, also, *Bateman v. Ross*, 1 Dow. 245.

³ *Haworth v. Herbert*, Dyer, 106 b., pl. 22; 1 Bright, H. & W. 539, pl. 10; 2 Crabb, R. P., § 1189; Park, Dow. 225.

⁴ *Govier v. Hancock*, 6 Term Rep. 603; 1 Roper, H. & W. 561; 1 Greenl. Cruise, 199, note.

⁵ Co. Litt. 33 a., note 8; 13 Rep. 23; 1 Roper, H. & W. 559; 1 Washb. R. P. 196, pl. 4.

CHAPTER XIX.

DIVORCE AS AFFECTING DOWER.

1. It is a question upon which there is a diversity of opinion in the American States, whether a divorce *à vinculo matrimonii*, will terminate the right of dower of the wife in the estate of the husband from whom she has been divorced, in the absence of a legislative saving of that right; and the difficulties attending a correct determination of this question have been greatly increased by the radical changes made in this country in the matrimonial law of England.

2. Lord Coke, says: "It is necessary that the marriage do continue; for if that be dissolved, the dower ceaseth; *ubi nullum matrimonium, ibi nulla dos*. But this is to be understood when the husband and wife are divorced *à vinculo matrimonii*, as in case of pre-contract, consanguinity, affinity, &c., and not *à mensâ et thoro* only, as for adultery."¹ The distinction here made between the grounds of a divorce *à vinculo matrimonii* and a divorce *à mensâ et thoro* in the English law, is an important one, and has a material bearing upon the subject under consideration.

3. We have seen in a former part of this work, that there are certain impediments to marriage, known as the canonical and the civil. With but a single exception (that of infancy) the civil disabilities render a marriage void *ab initio*. The canonical disabilities, except where otherwise provided by statute, make it voidable only.² If a marriage voidable by reason of canonical impediments, be dissolved by decree, the effect is to entirely annul it. From that time forward the marriage is treated as void from the beginning, and the parties as having never been married.³

4. It is to a decree of divorce having this effect, that Lord Coke refers when he says, "*ubi nullum matrimonium, ibi nulla dos*."

¹ Co. Litt. 32 a. See Park, Dow. 19, 20; post, § 13.

² Vol. i., ch. vii.

³ Vol. i., ch. vii., §§ 2, 4; ch. viii., § 19; Park, Dow. 19, 20; Bishop, Mar. & Div. 3d ed., ch. 30.

This is shown by his language limiting the operation of the rule stated by him to cases of divorce for "pre-contract, consanguinity, and affinity," all of which belong to the class of canonical disabilities; and by the fact that the English matrimonial law does not admit of a divorce *à vinculo* for causes arising subsequent to the marriage. Where, as in the cases above mentioned, a decree dissolving the marriage, operates as a sentence of nullity, there is no difficulty in understanding the reason why the right of dower is determined by the judicial act. The marriage contract is annihilated; in contemplation of law, the relation of husband and wife never subsisted between the parties; their rights of property, as between themselves, are to be viewed as having never been operated upon by the marriage.¹ It is plain that under these circumstances there can be no right of dower.

5. In the American courts, however, the practice as to divorces is different. The statutes of nearly all the States, departing in this respect from the English law, provide for a dissolution of the marriage for matters arising subsequent to its solemnization; but decrees of divorce founded upon these statutes operate prospectively only, and do not avoid the marriage from the beginning. The marriage stands as a good marriage from the time it was entered into down to the date of the decree of dissolution. Whether, to this condition of the parties, so different from that resulting from a divorce *à vinculo* in the English ecclesiastical courts, the same consequences as to dower attach, is a grave and important question.

6. Parliamentary divorces bear some analogy to divorces granted in this country; as they do not assume to declare the marriage null *ab initio*, and are granted for causes arising after the marriage. In regard to these, it does not seem to be claimed that they divest the dower of the wife, unless it is so expressly provided by the Act. Referring to the rule of the common law as laid down by Lord Coke, that on a divorce *à vinculo matrimonii*, the wife loses her dower, Mr. Bright, says:² "The points laid down in the above authorities, seem to apply to divorces *à vinculo matrimonii* granted by the ecclesiastical courts, where the marriage is declared null and void *ab initio*. What are the effects of a divorce *à vinculo matrimonii*, granted by Act of Parliament, does not very clearly

¹ Bishop, Mar. & Div. 3d ed., § 647.

² 2 Bright, H. & W. 366, pl. 10-12.

appear." It is deemed essential, however, in all divorce Acts in which the husband is the suitor, to insert a clause excluding the wife from her dower;¹ and of this clause, Mr. Macqueen says that it is intended "to deprive the divorced wife of the rights which, (but for the Act), would accrue to her as a widow out of the husband's property, in the event of her survivorship."² Concerning divorce Acts where the wife is the suitor, the same writer remarks: "There is no express provision made to determine what her rights shall be as regards the property of the divorced husband. For anything appearing in the Act to the contrary, she may still, notwithstanding the divorce, claim dower out of her divorced husband's estate at his death, and her distributive share of his personal property."³ If an Act of Parliament dissolving the marriage contract do not divest dower except a special clause excluding it be inserted, it is difficult to conceive upon what principle a judicial decree can have that effect in the absence of legislation providing that such shall be its operation. In either case, the dissolution of the marriage is absolute and complete; so far as the question made is concerned, it seems perfectly immaterial by what authority that result is attained.

7. The practice of granting parliamentary divorces, grew out of the stringent rule of the ecclesiastical courts before referred to, holding marriage to be a sacrament, and as such, indissoluble except for causes that rendered it invalid in its inception. Even in cases of adultery, the injured party had no other remedy than a divorce *à mensâ et thoro*—"a sort of insult," as has been justly observed, "rather than a satisfaction to any man of ordinary feelings and understanding."⁴ But from the time of the Reformation, marriage ceased to be regarded as a sacrament, and was no longer held to be indissoluble. It is true that the ecclesiastical courts did not, in form, give sentences of express dissolution for causes happening after the marriage. "They seem rather," says Macqueen, "to have adhered to their ancient form of judgment. They only divorced *à mensâ et thoro*. But in whatever shape their decrees

¹ Macqueen's Practice of the House of Lords, 507; Macqueen on Husb. and Wife, 211; 2 Bright, H. & W. 367.

² Macqueen, H. & W. 211.

³ Macqueen, H. & W. 215. See, also, Macqueen's Practice of the House of Lords, 507-8.

⁴ Macqueen, H. & W. 197.

were pronounced, the community, in cases of adultery, relied upon them as justifying a second act of matrimony."¹ The case of the Marquis of Northampton, which occurred in 1548,² is referred to by that writer, in support of his position. In that case, it was held by a commission of delegates, at the head of which was Archbishop Cranmer, that a sentence of divorce for adultery, though purporting to be only *à mensâ et thoro*, enabled the injured husband to marry again, living his guilty wife.

8. But, while the Church of England, as a body, disclaimed the doctrine of indissolubility, it seems that sundry individual ecclesiastics adhered to the old opinion. Thus, Whitgift, who was primate from 1583 to 1603, having called before him certain "sage divines and civilians," put to them this question,—“Whether, after divorce, it were lawful for a man to marry again, his first wife being still alive?” To which they responded in the negative; whereupon, the archbishop, being a member of the court of star chamber, it was contrived soon afterwards, in 1602, to bring before that tribunal the case of *Rye v. Foljambe*. There, it appears that Foljambe, having been divorced for adultery, married a second time, living his first wife; and it was held that the second marriage was void, “because,” according to the report of Moore,³ “the first divorce was but *à mensâ et thoro*, and not *à vinculo matrimonii*; and John Whitgift, then Archbishop of Canterbury, said that he had called to him at Lambeth the most wise divines and civilians, who all agreed in this.” Mr. Serjeant Salkeld, in his note upon the case,⁴ says that “in the beginning of the reign of Queen Elizabeth, the opinion of the Church of England was, that after a divorce for adultery, the parties might marry again. But in Foljambe’s case, anno 44 Eliz. in the star chamber, that opinion was changed.” Mr. Macqueen says of it, that “it was a direct contradiction of the ‘*Reformatio Legum*,’⁵ of the Marquis of Northampton’s case, and of the Ecclesiastical Constitutions of 1597.⁶ It was also opposed to the practice of the laity for at least half a century. . . . So that the decision appears to have had all the characteristics of an arbitrary exercise of power by a tribunal which, in fact, had no legal jurisdiction over the subject-matter; a tribunal, too, which, for its tyrannical excesses, was, in a few years afterwards, swept away by an indignant Parliament.”⁷

¹ Macqueen, H. & W. 200.

² Burnett’s Reformation, vol. ii., p. 115.

³ Page, 683.

⁴ 3 Salk. 138.

⁵ See Macq. H. & W. 199.

⁶ See Macq. H. & W. 200, 201.

⁷ Ibid. 203.

9. The decision in the court of star chamber was never assented to by the ecclesiastical courts. The next year after it was made, the chamber of convocation, its popular parliament, enacted a canon which clearly shows that it still continued to be the opinion of the Church of England, that upon a divorce for adultery, even though only *à mensâ et thoro*, the parties might marry again. It is as follows: "In all sentences pronounced only for divorce and separation *à thoro et mensâ*, there shall be a caution and restraint inserted in the said sentence, that the parties so separated shall live chastely, and neither shall they during each other's life contract matrimony with other person. And for the better observance of this last clause, the said sentence of divorce shall not be pronounced until the party or parties requiring the same shall have given good and sufficient caution and security unto the court that they will not any way break or transgress the said restraint or prohibition." In 1604, which was the year following the second enactment of this canon, the statute of bigamy was passed, which contained an express proviso that it should not extend to any person divorced by the ecclesiastical courts. Under this canon, the courts continued to grant divorces, exacting in every case from the suitor a bond not to marry again, as a condition precedent to granting the decree sought.¹

10. "How far the conduct of the laity may have been affected by these proceedings," remarks Mr. Macqueen,² "it is difficult now to conjecture. What particular rule respecting second marriages was followed in the reign of James I., or in that of his son, or during the time of the Commonwealth, we know not. Mr. Spence, indeed, in his work on Equitable Jurisdiction,³ suggests it as 'not unlikely' that the court of chancery decreed divorces *à vinculo matrimonii*; and upon that surmise builds another, namely, that the American courts of equity carried over with them from England their now existing practice of dissolving marriage contracts. With great respect for Mr. Spence, I must observe that both these speculations seem groundless. As to what was anciently done by the clerical chancellors, there is no evidence that any of them, as chancellors, ever meddled with the marriage contract. If the proposition had been advanced respecting the privy council, or court

¹ Macqueen, H. & W. 201, 203-4; Wait v. Wait, 4 Comst. 95, 104-6.

² Macq. H. & W. 204.

³ Vol. i., p. 702.

of star chamber, there would have been more color for it. But as to the court of chancery, there is nothing to support the fabric of Mr. Spence, except two obscure entries in Tothill's Reports,¹ referable to the time of Lord Ellesmere, and occurring near the close of Queen Elizabeth's reign. The cases there mentioned, however, are cases of divorce *à mensâ et thoro*, and not *à vinculo matrimonii*. This has been ascertained on an examination of the proceedings which are still extant in the rolls office. In the Life of Sir Leoline Jenkins,² notice is taken of 'Pierrepoint's petition to the lord keeper for a commission to dissolve a marriage.' But this seems to have been a mere experiment made shortly after the Restoration, and before the government was settled. It came to no result further than that the lord keeper ordered a reference (I believe to Sir Leoline Jenkins himself), and, upon a report, the matter dropped."

11. "We are, in the reign of Charles II.," proceeds the same author, "enabled to lay our finger upon a case which shows that so far down as the year 1669, the only obstacle which was considered an insuperable impediment to a second marriage after sentence of divorce *à mensâ et thoro* for adultery, was the bond in the ecclesiastical court;³ which, however, could have been binding upon one only of the parties. I am now referring to the case of Lord Roos, which has been usually considered as furnishing the first example of a parliamentary divorce; whereas, it was a bill brought in merely to be relieved from the restraint and prohibition of the ecclesiastical court. The facts were shortly these: In the year 1666, an Act was passed bastardizing the children of Lady Anne Roos, by reason of her adultery; whereupon her husband, Lord Roos, followed up this proceeding by obtaining from the spiritual court a sentence of divorce *à mensâ et thoro*, upon the usual condition of not marrying again in his wife's lifetime, for which he gave security as required by the canon. In this situation, being the next heir to the Rutland peerage, he was advised, that, although his marriage was rescinded, he had still to get rid of his bond or recognizance. No other way seemed so proper or sufficient for this purpose as an Act of Parliament. Accordingly a bill was brought in, entitled 'An Act for Lord Roos to marry again.' This, therefore, was not a divorce bill. It did no more than simply enable Lord Roos to contract a second marriage, the canon and

¹ Ed. 1649, p. 61; ed. 1671, p. 124.

² Vol. ii., p. 723.

³ Ante, § 9.

the bond notwithstanding. The case is principally interesting and important as constituting a distinct legislative negation of the doctrine of indissolubility. The difference between it and the case of the Marquis of Northampton¹ was this: The marquis was barred by no restraint from marrying another wife immediately after the sentence; whereas Lord Roos was prevented from doing so by the canon and the bond, from the binding cogency of which it was the sole object of the bill to relieve him."

12. But about the beginning of the last century, several instances occurred in which some of the nobility, unfortunate in their domestic relations, and having failed in obtaining the relief they sought from the ecclesiastical tribunals, prevailed upon Parliament to grant them a divorce. And by degrees it became the established practice of Parliament to grant divorces in particular instances, by passing special enactments in favor of those who made out a case strong enough for its interference.²

13. It does not appear ever to have been judicially determined that a mere dissolution of the marriage by Act of Parliament leaves the inchoate dower right of the divorced wife unimpaired. But as we have seen,³ it is the invariable practice, in framing the bill, to provide in express terms for its exclusion in cases where the husband is the complaining party. The insertion of such a clause seems to be assumed as necessary for the protection of the husband against a future claim of dower.⁴ And the effect attributed to divorces *à mensâ et thoro* decreed by the ecclesiastical courts after the Reformation, tends to confirm the opinion that without that clause the dower right would not be divested. For, as we have seen, in all the forms in which divorces for adultery have been granted since that period, with the exception of such restraint as may have been imposed by the bond exacted under the canon of 1603,⁵ the parties have been at liberty to marry again. Practically, the marriage was as effectually dissolved, and the parties as completely freed from its obligations by a divorce for adultery granted under an ecclesiastical sentence as by a Parliamentary Act; and yet it has never been held, or even asserted, that such a divorce would deprive the wife of her dower.⁶ Indeed, it has been expressly

¹ Ante, § 7.

² Macqueen, H. & W. 207-9.

³ Ante, § 6.

⁴ Ibid.

⁵ Ante, § 9.

⁶ Wait v. Wait, 4 Comst. 95, 106-7.

determined in the English courts, that a divorce *à mensâ et thoro* for adultery is not a bar of dower.¹

14. One of the earliest American cases in which this subject is alluded to, is *Day v. West*.² It was there held, in accordance with the English precedents, that a divorce *à mensâ et thoro* is no impediment to a claim of dower; but the vice chancellor added: "It may be asked, what becomes of the wife's right of dower where she proceeds against her husband and obtains a divorce *à vinculo matrimonii*? The answer is obvious. In such a case, all right to dower is gone; not, however, because she has obtained an allowance of permanent alimony, or anything in lieu of alimony, if either should be decreed, but because of the dissolution of the marriage which puts an end to the relation of husband and wife; and, by necessary consequence, to the right of dower—since it is essential to dower that the marriage should subsist at the death of the husband. A woman can not have dower who is not the wife of a man in whose lands she claims it at the time of his death."

15. In the opinion of Willard, V. C., in the case of *Burr v. Burr*,³ these observations occur: "A decree for a separation, or limited divorce, does not *per se* affect the question of property between the parties. The wife is still entitled to dower in the real estate of which her husband is, or shall thereafter be seized; and she can also claim her distributive share of his personal estate in case he dies intestate, in the same manner as if no such decree had been pronounced. The statute has made a difference in this respect, between a limited divorce *à mensâ et thoro* and a divorce *à vinculo matrimonii* for adultery. In the latter case, the wife being the guilty party, forfeits her dower and her right to a share of the personalty under the statute of distributions; and the husband still retains his marital rights to her real and personal estate in the same way as if no divorce had been pronounced. If the husband is the guilty party, the wife is allowed, in such case, to hold her real estate, if she have any, discharged of his claim, as well as her personal estate which has not been already reduced to possession by him.⁴ But I apprehend, after a divorce for adultery, the wife

¹ Lady Stowell's case, Godb. 145; *Powell v. Weeks*, Noy, 108; Co. Litt. 32 a., note 9; 2 Inst. 435; Park, Dow. 20; 1 Bright, H. & W. 539, pl. 6. *Contra*, Roll. Ab. 680, pl. 13.

² *Day v. West*, 2 Edw. Ch. 592.

³ *Burr v. Burr*, 10 Paige, 20, 25.

⁴ See 2 R. S. 142, 145.

being the complainant is still entitled to be endowed of the lands of which her husband has been theretofore seized. It is unnecessary, however, to decide or discuss this question, since there is a marked distinction between the consequences which result from a divorce *à vinculo matrimonii* and a separation merely from bed and board. It is adverted to merely to show that the question of alimony does not necessarily involve the distribution of the husband's estate."

16. In the opinion of Bronson, J., in the case of *Reynolds v. Reynolds*,¹ there is found this dictum: "As to a divorce *à vinculo*, that always put an end to the claim of dower; for although it was not necessary that the seizin of the husband should continue during the coverture, it was necessary that the marriage should continue until the death of the husband." In the case of *Charruaud v. Charruaud*,² it was expressly laid down that the wife can not have dower unless the marriage were "subsisting at the death of the husband."³

17. But it seems now to be thoroughly established in New York that a divorce dissolving the marriage contract on the ground of the adultery of the husband, does not deprive the wife of her right of dower in his estate. The point was finally determined in the case of *Wait v. Wait*. In the supreme court, a majority of the judges were of the opinion that dower was lost by the divorce, and gave judgment accordingly;⁴ but in the court of appeals, that judgment was reversed.⁵ Harris, J., who delivered the opinion of the court, in discussing the legal effect of the divorce, said: "A divorce at common law avoided the marriage *ab initio*. It was equivalent to a sentence of nullity under our statute. It placed the parties in the same relation to each other as though there had been no marriage. The issue of the marriage were bastardized. It was in reference to the law as it then stood, that Lord Coke said, that to entitle the wife to dower it was necessary that the marriage should continue, for if that be dissolved the dower would cease. This rule, he is careful to say, is only applicable where there is a divorce *à vinculo matrimonii*; in other words, when the marriage

¹ *Reynolds v. Reynolds*, 24 Wend. 193, 196.

² *Charruaud v. Charruaud*, 1 N. Y. Leg. Obs. 134.

³ See, also, the reasoning of the court in *Cooper v. Whitney*, 3 Hill, 99.

⁴ *Wait v. Wait*, 4 Barb. 192, Willard, J., dissenting.

⁵ *Wait v. Wait*, 4 Comst. 95.

is declared void *ab initio*.¹ For adultery, the divorce or separation, at common law, was only *à mensâ et thoro*. Of course, it did not affect the right of dower. Until our statute, there was no such thing as a divorce which recognized and admitted the validity of the marriage, and avoided it for causes happening afterwards. Such a divorce is alone the creature of the statute. The principles applicable to a common law divorce can not be made applicable to a divorce which admits the validity of the marriage, and the rights and obligations resulting from it. The effect of such a divorce must be determined entirely by the provisions of the law under whose authority it is granted. The common law divorce avoided the marriage, and all rights and obligations resulting from it. The statutory divorce is limited in its operation, and only affects the rights and obligations of the parties to the extent declared by statute. The marriage being valid, the rights it conferred, and the obligations it imposed, continue, where the legislature has failed to interfere."

18. The learned judge then referred to various provisions of the statute which tended, by implication, to negative the idea of any intention on the part of the legislature to deprive the wife of her dower, where she was the aggrieved party. He also reviewed the practice of the English courts with regard to divorce; and in that connection remarked: "Under the English practice I can see nothing which should prevent the wife, though, after obtaining a divorce for the adultery of her husband she might have become the wife of another, from obtaining at the death of her divorced husband her dower in the estate of which he was seized during her coverture with him. This I understand to be the doctrine taught by Lord Coke, though he says nothing of the second marriage. There would be no injustice in it. On the contrary, justice requires that the innocent and injured wife should not be deprived of this right. To withhold it, would be to violate one of the first principles of justice. It is well remarked by Mr. Justice Willard in his dissenting opinion in the court below, that 'it is contrary to the analogy of the law to permit the crime of one party to work a forfeiture of the rights of another.' We have already seen that there is nothing in the statute which conferred the authority under which the plaintiff was divorced from her husband, which requires that a construction should be given to it, involving such an anomaly; but, on the

¹ Ante, §§ 2-4.

contrary, there is reason to infer from the fact that the legislature have deprived the wife of her dower when she is the guilty party, that they did not design to deprive her of it when the innocent party."¹

19. "The wife at the marriage, when she becomes a wife," the learned judge continued, "acquires the right to be endowed. If, at that time, the husband is seized of an estate of inheritance in lands, her right attaches to those lands at once. If, afterwards, and during the coverture, other lands are acquired, her right also attaches to these. Kent, too, as we have seen, regards dower as an *interest* which *attaches* on the land as soon as there is the concurrence of marriage and seizin. When this happens I can not see why her right to have her dower in case she survives her husband, is not as perfect as it is after his death. It is contingent, it is true, and becomes absolute, only by survivorship. But still it is a vested right of which she can only be deprived by her own act, or by forfeiture.² To construe her application for a divorce into a voluntary release or a forfeiture of her right would be contrary to every principle of legal construction. A party can not be deprived of a vested right, even though it be contingent, by mere implication. When the wife is herself the guilty party, the law declares that her conviction shall involve a forfeiture of her dower. But it has nowhere said, that when the husband is the offender, she shall forfeit her dower, as a condition of her divorce. My conclusion, therefore, is, that the common law doctrine, *ubi nullum matrimonii, ibi nulla dos*, is not applicable to a divorce which admits the validity of the marriage, and dissolves it for some subsequent cause, as adultery. It is conceded that a divorce under the statute has no retroactive effect. Its operation is specifically defined. It has no other effect than that declared by the statute. When the wife is the complaining party, if she obtains a decree, the marriage is so far dissolved as to release the parties from the duty of mutual cohabitation, and, so far as her own property is concerned, the wife is as far as practicable, restored to the position in which she stood before the marriage. But in respect to the husband's property, her rights are not changed. She is still entitled to a support while the husband lives, and her dower in case she survives him. She and her children, alike unoffending, retain the same rights as if the husband and the father

¹ 1 Rev. Stat., p. 741, § 8; 2 Ibid., p. 146, § 48.

² Ante, ch. i., §§ 3-20.

had been faithful to his obligations. His offence works no forfeiture of their rights."

The doctrine above laid down was approved and followed in the recent case of *Forrest v. Forrest*,¹ determined in the Superior Court of the city of New York.

20. But in Indiana,² Iowa,³ and Wisconsin,⁴ it has been held, that a divorce *à vinculo matrimonii* operates as an extinguishment of dower in the estate of the divorced husband, unless the right be saved by statute.⁵ In Kentucky, the statute declares, that a divorce shall bar all claim to dower.⁶ In Pennsylvania, it is provided, that after a "sentence nullifying or dissolving the marriage, all, and every, the duties, rights and claims accruing to either of the said parties at any time theretofore, in pursuance of the said marriage, shall cease and determine."⁷ A similar statute has been adopted

¹ *Forrest v. Forrest*, 6 Duer, 102, 152, 153; s. c. 3 Abbott's Pr. R. 144. And see *Mansfield v. McIntyre*, 10 Ohio R. 27; post, § 25.

² *Whitsell v. Mills*, 6 Ind. 229; *Billan v. Hercklebrath*, 23 Ind. 71. And see *Chenoweth v. Chenoweth*, 14 Ind. 2. But it was decided in *Russell v. Russell*, 1 Carter's (Ind.) Rep. 510, that "a court granting a divorce on the application of a wife for the cruel treatment, &c., of her husband, can not, by decreeing alimony in lieu of dower, divest her of her dower interest in her husband's real estate."

³ *Levins v. Sleator*, 2 Greene (Iowa), 604; *McCraney v. McCraney*, 5 Clarke (Iowa), 232.

⁴ *Brudick v. Briggs*, 11 Wis. 126.

⁵ See, also, *Clark v. Clark*, 6 Watts & Serg. 85, 88. By the present statute of Indiana, a divorce for the misconduct of the husband, entitles the wife to the same rights, as far as her real estate is concerned, that she would have been entitled to by his death. 2 Rev. Stat. Ind. 1852, p. 237, § 18.

⁶ 2 Rev. Stat. Ky. by Stanton, p. 27, § 15. But a divorce from bed and board does not have that effect. *Ibid.* p. 22, § 8. See *Cabell v. Cabell*, 1 Met. (Ky.) 319. In this case, a legislative divorce had been obtained with the written assent of the wife, and she received a sum of money agreed upon at the time of the separation, and acquiesced in the divorce for thirteen years, enjoying in the meantime the rights of a *feme sole*. It was held that she was barred of dower. See, also, *Gaines v. Gaines*, 9 B. Mon. 295, 303, where it was determined, that a divorce granted by the legislature, against the consent of the wife, who had previously instituted proceedings for alimony, was unconstitutional, and did not affect her right to dower.

⁷ *Purdon's Digest*, by Brightly, p. 348, § 15. Under this statute it is held, that a dissolution of the marriage by divorce works as complete a separation as when that relation is terminated by death. *Flory v. Becker*, 2 Barr, 470, 472; *Miltimore v. Miltimore*, 40 Pa. St. (4 Wright), 151, 156. And that the wife is barred of her dower although the divorce be granted for adultery of the husband. *Miltimore v. Miltimore*, *supra*. See, also, *Clark v. Clark*, 6 Watts & Serg. 85, 88. The courts of Pennsylvania, have power to vacate a decree of divorce obtained by fraud, although a marriage has been subsequently contracted on the faith of the decree, and issue born.

in North Carolina.¹ And the learned author of "Commentaries on the Law of Marriage and Divorce," maintains that "the common law of this country is clearly established, that no woman can have dower in her husband's lands, unless the coverture were continuing at the time of his death."² And he adds: "The reason appears to be, that, as the English common law never recognized any right of dower unless the woman were covert when the husband died; our courts can not create such a right in her, by construction, merely because, in consequence of a legislative enactment, she is found in circumstances unknown to the common law."³ And this view appears to receive support from decisions that have been made holding that a divorce *à vinculo* terminates the interest of the husband as tenant by the curtesy in the lands of the wife.⁴

21. The cases in which it is adjudged that inchoate dower is divested by a dissolution of the marriage, seem to proceed chiefly upon the ground that to entitle a woman to dower, it is essential she should answer the description of a *wife* at the time the right becomes consummate; that it is only the *widow* who can be endowed, and she can only be endowed in the estate of her deceased *husband*. Thus, in *Whitsell v. Mills*,⁵ the court give the following as the principal ground of their judgment: "All the provisions of law to be found in relation to this subject speak of the '*widow*' as the only person entitled to dower. The meaning of the term is, therefore, important. Webster says she is 'a woman who has *lost* her husband by death.' This is the popular signification of the word, and, we think, its legal meaning. But Sarah Mills lost her husband by divorce, and not by death. According to the elementary books, the marriage must continue until the husband's death, and the claimant must be then his actual wife. This being essential to

Allen v. Maclellan, 12 Pa. St. (2 Jones), 328, 330. Or the party by whom it was obtained has died in the meantime. *Boyd's Appeal*, 38 Pa. St. (2 Wright), 241. And where a decree of divorce obtained by the fraud and imposition of the husband, has been vacated after his death, the wife is thereby restored to her rights under the marriage. *Ibid.* 246. But where a wife obtained a decree of divorce from her husband, on the ground of adultery, and after more than seven years, on the death of her husband, endeavored to avoid the decree on the ground of irregularity, it was held that she was estopped. *Miltimore v. Miltimore*, 40 Pa. St. (4 Wright), 151.

¹ Rev. Code N. C. 1855, p. 253, § 11.

² Bishop, Mar. & Div. 3d ed. § 661. See, also, 4 Kent, 54.

³ Bishop, Mar. & Div. 3d ed. § 661.

⁴ Bishop, Mar. & Div. 3d ed. § 666, and cases cited.

⁵ *Whitsell v. Mills*, 6 Ind. 229, 231.

constitute her his widow, if she be divorced *à vinculo*, she shall not be endowed, for *ubi nullum matrimonium, ibi nulla dos*.”¹

22. The argument thus made seems to be fully met by the following well considered observations of the court in the case of *Wait v. Wait*:² “Whether or not a woman, divorced from her husband, upon his subsequent death, is to be called his widow, may furnish a curious question in philology, but can not, I think, be decisive of the plaintiff’s rights. It is true, the legislature, in declaring what estates are liable to dower, speak of the party entitled to dower, as *a widow*. Possibly the term may not, in every instance, be the most appropriate; yet as descriptive of the person intended, it is clearly sufficiently so. All that the legislature meant, is, that when a woman is entitled to dower, she shall be endowed of a third part of all the lands whereof her husband was seized at any time during the marriage. So of the term *marriage* used in the same section; strictly, it means nothing more than the act of uniting a man and a woman for life; yet here the legislature have used it to describe the whole period of *coverture*. All, then, that the legislature have said, amounts to this: that dower is predicable only of an estate of inheritance of which the husband was seized during *coverture*.”

23. In Massachusetts, the wife is entitled to dower where she has been divorced from her husband for the cause of adultery committed by him, or on account of his being sentenced to imprisonment to hard labor; but she can not claim dower in any other case of divorce from the bond of matrimony.³ Similar statutes are in force in Wisconsin,⁴ Minnesota,⁵ and Oregon.⁶ In Michigan, the right of dower is saved where the divorce was decreed for adultery of the husband, or for his misconduct or habitual drunkenness, or on account of his being sentenced to imprisonment for a term of three years or more.⁷ In Missouri,⁸ Kansas,⁹ and Ohio,¹⁰ dower is not lost by a divorce granted for the fault or misconduct of the husband; but if it be granted for the fault or misconduct of the wife, she is

¹ See, also, *Levins v. Sleator*, 2 Greene (Iowa), 604, 609; *McCraney v. McCraney*, 5 Clarke (Iowa), 232.

² *Wait v. Wait*, 4 Comst. 95, 107; ante, §§ 17-19.

³ Gen. Stat. Mass. p. 535, § 38; p. 697, § 9.

⁴ Rev. Stat. Wis. 1858, p. 626, § 25.

⁵ Stat. Minn. 1858, p. 466, § 24.

⁶ Stat. Oregon, 1855, p. 540, § 10.

⁷ 2 Comp. Laws Mich. p. 957, § 24.

⁸ 1 Rev. Stat. Misso. 1855, p. 671, § 14.

⁹ Comp. Laws Kansas, 1862, p. 474, § 7; p. 479, § 9.

¹⁰ 1 Rev. Stat. Ohio, p. 512, § 7.

barred of her dower. The law is the same in Illinois, except that dower is not allowed where the marriage was void from the beginning.¹ In Maine, if a divorce is decreed for the fault or misconduct of the husband, except for impotency, the wife has dower.² In Connecticut, a divorce does not defeat dower where the wife is the innocent party.³ In Tennessee,⁴ and Arkansas,⁵ if a divorce be decreed for the misconduct of the wife, she can not be endowed.⁶ In the District of Columbia, the court granting a divorce may allow the wife to retain her dower.⁷

24. It has been held in Ohio, that a divorce granted in Kentucky for the aggression of the wife, does not bar her of dower in lands situate in the former State.⁸ "In the sixth section of the 'Act concerning divorce and alimony,'" said Hitchcock, J., who delivered the opinion of the court, "it is provided 'that when the cause of divorce shall arise from the aggression of the wife, she shall be barred of her right of dower whether there be issue or not.' But does this apply to divorces generally, or to those decreed by our own courts in pursuance of this statute? A very slight examination of the statute will be sufficient to convince any one that it applies only to divorces decreed in our own courts. If the divorce is on account of the aggression of the husband, the wife is restored to all her real estate, and is to be allowed out of the real and personal estate of her husband such share as the court shall deem reasonable, having regard to the personal property that came to the husband by the marriage. But if the divorce shall arise from the aggression of the wife, the court may order to her, restoration of the whole or a part of the lands, tenements and hereditaments, and also such share of the husband's personal property as may appear reasonable, all circumstances considered. In the latter case she is barred of dower in her husband's lands; in the former she is not. If there are children of the marriage, who are infants, the court are authorized to direct that they be committed to the guardianship of the mother, or remain with the father, as shall seem most expedient.

¹ 1 Stat. Ill. 1858, p. 153, § 12; *Clark v. Lott*, 11 Ill. 114.

² Rev. Stat. Maine, 1857, p. 395, § 6.

³ Stat. Conn. 1854, p. 382, § 17. See *Goodwin v. Goodwin*, 4 Day, 343.

⁴ Code Tenn. 1858, p. 486, § 2473.

⁵ Dig. Stat. Ark. 1858, p. 452, § 8. See, also, Ala. Code, 1852, § 1974.

⁶ See vol. i., ch. xxxi.

⁷ 12 U. S. Stat. at Large, p. 60, § 9.

⁸ *Mansfield v. McIntyre*, 10 Ohio, 27.

In fine, the court are authorized to make such disposition of the property, and also of the children, as shall do perfect justice between the parties. Now, this can not be done by a court in another State, certainly not under the provisions of our law, and therefore it could not have been the intention of the legislature to declare the effect of any other decrees than those pronounced by our own courts."

25. In a later case in the same State, it was held, that a woman who has obtained a divorce *à vinculo* for the fault of her husband, and afterwards married another man, is not, after the death of the person who was her first husband, entitled to dower in his estate.¹ "In such case," it was said, "the dower is not lost by way of forfeiture; but a woman divorced *à vinculo matrimonii* from her first husband, and by subsequent marriage the wife of another man at the time of the death of the person who had been her first husband, is not the *widow* of the latter within the terms of the statute relating to dower." The case was decided, however, by a bare majority; two of the judges holding, that when the divorce is granted to the wife on account of the aggression of the husband, she is entitled to dower; and that her subsequent marriage has no more effect on her right than the marriage of a widow.

¹ Rice v. Lumley, 10 Ohio St. 596.

CHAPTER XX.

THE STATUTE OF LIMITATIONS AS AFFECTING DOWER.

§ 1-3. The rule as established in England.

4-7. New York.

8. Massachusetts.

9. New Hampshire.

10-12. Maine and New Jersey.

13. Ohio.

14, 15. Kentucky.

16. Maryland.

17, 18. Tennessee.

19. North Carolina and Missouri.

20, 21. Georgia.

22. Mississippi.

23, 24. South Carolina.

25. Michigan.

26. Iowa and Indiana.

27. The general doctrine considered.

28. The statute does not run against the wife during the life of the husband.

1. In his treatise on the Law of Dower, Mr. Park says:¹ "No statute of limitations has prescribed any period for the bringing of a writ of dower. The remedy, however, may be barred by the statute of non-claims, if the husband levies a fine with proclamations, and the wife does not bring her writ of dower within five years after her title accrues by the death of her husband, or after the disabilities (if any) existing at that time, are removed.² So if

¹ Park, Dow. 311.

² *Damport v. Wright*, Dyer, 224 a.; *Anne Summer's case*, Winch, 66; 2 Co. 93; 10 Co. 49, 99; *Moor*, 53; *Shep. T.* 28, 32; *Menvil's case*, 13 Co. 20; *Golds.* 148, pl. 71; *Anon.* 3 Leon. 50; *Crave v. Broughton*, Dal. 107; s. c. *Ibid.* 52; 2 Roll. R. 69, s. p. arg. cites 15 Eliz., *Paine's case*. This point was formerly doubted. See 3 Leon. 50, and *Stowel's case*, Plow. 373 a., where the learned commentator says: "Note, reader, that in my opinion, if the husband levies a fine with proclamations, and five years pass after the proclamations, the wife shall not be bound to five years after the death of the husband, but is at large, and not touched by the purview of the Act of 4 Hen. VII. [c. 24.] For the purview was against those who had right at the time of the fine levied, or had future right after, upon a cause arising before; to which future right wrong was done before the fine, or by the fine, &c.; but here, in case of dower, the title is accrued all after the fine; sc. by the death of the husband, for till the death no title was consummate; and the other two points, sc. intermarriage and seizin of the husband are not of any moment without the third, so that all the three points are but one cause after the fine." "But," says Coke, in reply to the reasoning of Plowden, "although, to the consummation of dower, three things are requisite, that is to say, marriage, seizin, and the death of the husband; and although at the time of the fine levied, her title was not consummate, yet the

the husband aliens in fee, and his alienee levies a fine with proclamations, non-claim on this fine will be a bar to the writ of dower.¹ The same effect may arise from a fine levied by the heir or devisee of the husband."²

2. The English statute of limitations of 32 Hen. VIII., ch. 2,³ is peculiar in its character.⁴ According to Lord Coke, it does not apply "where the seizin is not traversable nor issuable;"⁵ upon which Mr. Hargrave remarks: "The reason is plainly this: the limitation in the 32 of Henry VIII. is wholly referable to seizin; the statute requiring a seizin within a certain time according to the nature of the writ; that is, sixty years for writs of right; fifty for possessory writs founded on an ancestor's possession; thirty for possessory writs founded on the party's own possession, and so on. Now the limitation being thus dated from a seizin, it would be absurd to extend the statute to actions in which seizin, not being issuable, can never become the subject of evidence or trial."⁶ This being the character of the statute, it became an established principle that it could have no application to the writ of dower. The dowress does not claim by descent, nor by grant;⁷ and, in the language of an American court, "it is clear that a limitation of dower can not be dated from the seizin or possession of the demandant, because she can not have either until dower has been assigned to her."⁸

3. But now by the English statute of limitations of 3 & 4 Will. IV., ch. 27, it is enacted, that no suit for dower shall be brought, unless within twenty years after the death of the husband.

law respects the first and original causes, *sc.* marriage and seizin." 2 Co. 93. And in another place he says: "And the opinion of Plowden aforesaid is not held for law, as appears in 6 Edw. VI., Dy. 72; and in Dampont's case, in 5 Eliz. 224, Dy., it appears it was adjudged to the contrary in 4 Hen. VIII., and now common experience without contradiction, is against it." 10 Co. 49; Park, Dow. 311, note.

¹ Shep. Touch. 28.

² 1 Prest. Conv. 229.

³ See this statute set out at length in the Appendix to Angell on Limitations.

⁴ For the grounds upon which the statute of James is held not to apply to dower, see post, §§ 12, 17.

⁵ Co. Litt. 115 a.

⁶ Hargr. Co. Litt. 115 b., note 4.

⁷ "A woman brought a writ of dower of the seizin of her husband sixty-one years past, the action lyeth, because that is not of her owne seizin, nor of none of her ancestors, nor predecessors, neither is it an action possessorie, and it is not prohibited by the statute." Brook's Reading upon the Stat. 32 Hen. VIII. cap. 2; Angell on Limitations, § 367, note.

⁸ Barnard v. Edwards, 4 N. H. 107.

4. The rule upon this subject is not uniform in the American States, but in many of them, statutes of limitation embracing proceedings for dower are in force.

5. In a case decided in New York in 1810, the statute of limitations was insisted upon in the argument as a ground of defence to a claim for dower, but the court refused to pass upon it, assigning as a reason that it had not been pleaded.¹ In the case of *Hogle v. Stewart*,² determined in 1811, it was held, that the Act limiting the period for bringing claims and prosecutions against forfeited estates, passed March 29, 1797,³ did not extend to, nor bar the claims of the widows of persons attainted, for their dower in the estates forfeited and sold by the commissioners of forfeitures. In *Jones v. Powell*,⁴ the question was made whether the general statute of limitations of New York,⁵ applied to suits for dower. The following is from the opinion of Chancellor Kent, upon that point: "It was upwards of twenty years between the time that the plaintiff removed from the premises in which her dower is claimed and the filing of the bill. Her removal was a voluntary act, after she had occupied these premises for upwards of two years subsequent to her husband's death. But the lapse of the twenty years was not a good legal bar within the statute of limitations. If there was no other statute provision on this subject, I think it might well have been contended that the general Act of limitations, passed in 1801, applied to actions of dower. By that Act, 'no person shall make an entry into lands but within twenty years next after his right or title accrued.' This limitation would apply to the possessory action, called in the case of a widow a writ of dower *unde nihil habet*,⁶ and which lies in case of deforcement of dower, by the refusal of the heir or purchaser to assign any dower. This limitation, however, might not have applied to the *writ of right of dower*,⁷ which, it is said, was necessary in the case where she was deforced of part, only, of her dower. If the widow lost her dower by default, the statute of W. 2, 13 Edw. I., (and which has been re-enacted among the provisions of the Act of the 26th of January, 1787), gave her the writ *quod ei deforceat*,⁸ which put in issue her right of dower, and which seems to have been in the nature of a writ of right. As far as her action at law belonged to the class of

¹ *Hitchcock v. Harrington*, 6 John. 290.

² *Hogle v. Stewart*; 8 John. 81.

³ Sess. 11, ch. 52.

⁴ *Jones v. Powell*, 6 John. Ch. 194.

⁵ Sess. 24, ch. 183; 1 N. R. L. 184.

⁶ *Ante*, ch. v., §§ 1, 2, 5.

⁷ *Ante*, ch. v., §§ 1, 2.

⁸ *Ante*, ch. vi., § 70.

possessory actions, founded on the right of entry, it would have fallen under the same limitation as an action of ejectment; and as far as it partook of the nature of a writ of right, (for the writ of right strictly so called, was only applicable to persons who claimed an estate in fee), it would seem to fall within the limitation of twenty-five years applicable to the writ of right. The same general statute declares that 'no action for the recovery of any lands, &c., shall be maintained, &c., unless on a seizin or possession, &c., either of the plaintiff, &c., or of the ancestor or predecessor of the plaintiff, within twenty-five years before such action brought.' The general and sweeping language of this Act, no less than the sound policy of it, would dictate the application of it to the action of dower, as well as to any other real action. But the Act of April 7, 1806,¹ declares generally, that 'a widow shall be at liberty, at any time during her life, to make a demand of her dower, agreeably to the Act of the 26th of January, 1787.' It also provided, 'that the heir or other proprietor or owner, after the expiration of the widow's quarantine of forty days, might cause notice in writing to be given to her to make demand of her dower, within ninety days thereafter, and if she neglected, he might apply to the surrogate, and cause her dower to be admeasured to her.' We may, therefore, put out of the consideration of this case the effect of any legal limitation to the action of dower at law. The better opinion would be that the limitation to twenty or twenty-five years, according to the nature of the action, under the Act of 1801, was done away by the Act of 1806; and to guard against the inconvenience of such an outstanding right, the Act gives to the tenant of the freehold the means of coercing the assignment of dower."

6. From the foregoing quotation, it appears, that in the opinion of the chancellor, a statute which, in general terms, bars an entry into lands, or an action for their recovery after the period limited, extends to and embraces suits for dower, although such proceedings are not specifically named. In the case cited, the claim of the widow would undoubtedly have been barred under the general statute of 1801, had it not been for the provisions of the subsequent Act of 1806. And very shortly after the decision of this case, a statute was adopted in New York, which is still in force, limiting

¹ 1 N. R. L. 60.

actions for the recovery of dower to twenty years from the death of the husband.¹

7. The statute above referred to is construed to operate prospectively only, and does not apply where the death of the husband occurred before it took effect.² And it seems, also, that the limitation can not be interposed as a bar, where the widow has been in possession of her dower, either with or without suit, and is subsequently ousted.³ But it will apply to cases of previous death, if the action be not brought within twenty years after the statute went into operation.⁴

8. In Massachusetts, in the case of *Parker v. Obear*,⁵ it was held, that "a writ of dower is not barred by the statute of limitations;" but this ruling proceeded mainly upon the construction given to the English statute of 32 Hen. VIII.⁶ "The statute of limitations of this commonwealth," said the court, "is derived from the statute of 32 Hen. VIII., c. 2;" and after quoting the English authorities before referred to, they added: "Without going more at large into authorities, it is evident that the statute of limitations⁷ refers to seizin and right of entry. The widow has no seizin in the land by reason of the death of her husband; and can sustain no action till after a demand upon the heir, or person who is seized of the freehold. We are clear that the statute of limitations was made with another purpose, and however broad the general words may be, they are not applicable to claims for dower." But by a statute recently adopted in Massachusetts, actions for the recovery of dower are barred unless commenced within twenty years from the death of the husband.⁸

9. The doctrine of the Massachusetts authority above cited, was

¹ 1 N. Y. Rev. Stat. p. 742, § 18. The Act contains a saving as to widows under the age of twenty-one years, insane, or imprisoned on a criminal charge or conviction, at the time the death of the husband occurs.

² *Sayre v. Wisner*, 8 Wend. 661; *Ward v. Kilts*, 12 Wend. 137. See *Spoor v. Wells*, 3 Barb. Ch. 199; post, § 21.

³ *Sayre v. Wisner*, 8 Wend. 661.

⁴ *Sayre v. Wisner*, 8 Wend. 661; *Brewster v. Brewster*, 32 Barb. 428, Peckham, J., dissenting.

⁵ *Parker v. Obear*, 7 Met. 24.

⁶ Ante, § 2.

⁷ Rev. Stat. 1836, ch. 119.

⁸ Gen. Stat. Mass. ch. 90, § 6. If, at the time of the death of the husband, the widow is absent from the State, or is under the age of twenty-one years, or is insane, or imprisoned, the action is to be commenced within twenty years after the disability ceases. Ibid.

applied in New Hampshire, to the case of *Barnard v. Edwards*;¹ but that decision was founded upon a like enactment. "This statute," remarked the court, in *Moore v. Frost*,² referring to the same Act, "was copied from the statute of June 16, 1791,³ changing only the time of limitation; and the last mentioned statute was copied from the English statute of 32 H. VIII., cap. 2." By the law now in force in New Hampshire, the widow is required to bring her action within twenty years from the time she demanded her dower, or she will be barred.⁴

10. In Maine, the courts appear to have recognized the limitation of twenty years as applicable to actions for dower.⁵ In New Jersey, it has been expressly decided that such actions are within the statute.⁶ In the latter State, the Act provides that "every real, possessory, ancestral, mixed, or other action, for any lands, tenements, or hereditaments, shall be brought or instituted within twenty years next after the right or title thereto, or cause of such action shall accrue, and not after."⁷ "The language is too plain and explicit," said the judge who delivered the opinion of the court in *Berrien v. Conover*,⁸ "as it appears to me, to admit of serious doubt. It not only includes mixed actions, of which dower is one, but all other actions for the recovery of lands, tenements, or hereditaments. That no precedent of such a plea is to be found in the English books, presents an argument of no force, for the plain reason that no such statute exists in Great Britain. . . . But even in England, such a bar has been more recently proposed. But whether the proposition has ever become a law, I am unable to say."⁹ In New York, and South Carolina, it appears, time forms a bar to the widow's claim of dower. Thus it appears we are not alone in thinking the widow's claim should fail of a remedy after a reasonable period hath intervened. The counsel who argued this case for the demandant, suggested that there was a privity between the widow and the heir, sufficient to prevent any adverse possession being set up against her. But it is altogether a mistake."

¹ *Barnard v. Edwards*, 4 N. H. 107.

² *Moore v. Frost*, 3 N. H. 126.

³ 1 N. H. Laws, 164.

⁴ Comp. Stat. N. H. ch. 192; *Robie v. Flanders*, 33 N. H. 524.

⁵ *Durham v. Angier*, 20 Maine, 242. As to the inclination of the courts in Pennsylvania to apply the statute, see *Allen v. Allen*, 2 Penn. 311.

⁶ *Berrien v. Conover*, 1 Harrison, 107; *Conover v. Wright*, 2 Halst. Ch. 613.

⁷ Rev. L. N. J. 411, § 10; Rev. St. N. J. 95, § 11.

⁸ *Berrien v. Conover*, *supra*.

⁹ See ante, § 3.

11. In the subsequent case of *Wright v. Conover*,¹ the chancellor of New Jersey was of opinion that the general limitation Act of that State did not apply to dower, and decreed accordingly. "Dower," he observed, "has a limitation in the nature of things. It is the use of a third part of the lands during the life of the widow only. In a large proportion, perhaps a majority of the cases, death puts an end to the enjoyment and to the claim of dower within twenty years from the death of the husband. There is no consideration of public policy requiring any other limitation. It is a claim of a peculiar nature, entirely different from claims for debt and from asserted titles to land. The amount of a debt is yearly increasing; and there is a policy in limiting a time within which it should be presumed paid. If one has title to land which another is holding adversely to him, there should be a limitation of time within which he should bring his action for it. The land may become more valuable by improvements put upon it by the person in possession; and the taking it from him, after the lapse of years, may inflict a heavily increased loss. But the value of the right of dower to the widow, and the burden of it to the owner of the land, is becoming less and less every year of her life. The alienee of the husband can put what improvements he pleases on the land; the widow gets dower only according to the value of the land at the time of the alienation. A purchaser from the husband knows he buys subject to the wife's inchoate right of dower, and the widow can recover damages, that is, the value of the dower only from the time she demands her dower. If she fails to demand her dower for twenty years, the purchaser has been relieved of the burden during that time. Does that furnish any reason why he should be relieved from it for the remnant of her life?"

12. But in the court of errors and appeals the decree of the chancellor was reversed, and it was held, that the statute applies to dower, and may be pleaded in equity as well as at law.² "It was urged upon the part of the respondent," the court remarked, "that the 10th section of our statute of limitations (11th in the revision) does not apply to the action of dower, and consequently can not be pleaded, either at law or in equity; and such is the view taken by the chancellor. One section of our Act copied from the English statute of 21 Jac. I., c. 16, sec. 1, bars the right of entry

¹ *Wright v. Conover*, 2 Halst. Ch. 482. ² *Conover v. Wright*, 2 Halst. Ch. 613.

into any lands, &c., unless made within twenty years after such right or title shall accrue. The widow has no right of entry until dower assigned, and the statute of 21 Jac. I., in England, and similar statutes in this country, have therefore been construed not to apply to the action of dower. It (21 Jac. I.) applies only to a right of entry, and therefore by its terms is inapplicable to the action of dower, which is founded, not on the right of entry, but on an inchoate right to have the one-third part of any lands of which the husband had been seized during coverture, set off and assigned to her. . . . It is true, lapse of time is not enumerated in the statute relative to dower as a bar to the action, and obviously because it naturally falls within another classification. *Parker v. Obear*,¹ is a decision upon a statute very similar to the 10th section of our Act, which the court then held, did not bar the writ of dower. But that decision may well be sustained upon the ground that in the State of Massachusetts the widow's cause of action does not accrue at the death of her husband, but only from the time of demand made. Here a demand is not necessary in order to support the action, although it may be important as affecting the amount of damages. Taking a different view than the chancellor of the policy of the statute, and holding the action of dower to be not only within the letter but the meaning and intent of the statute, we are unanimously of the opinion that his decree must be reversed."

13. So in Ohio, it has been held, that a proceeding for dower is within the general statute of limitations.² In *Tuttle v. Willson*,³ the widow instituted her suit twenty-three years after the death of her husband. The views of the court upon the question presented, were thus expressed: "In some of the States it has been decided that their statutes of limitation are not to be applied to a suit for dower. But such adjudications appear to have grown out of the peculiar phraseology of their laws. In *Jones v. Powell*,⁴ the chancellor seems to place it entirely upon that ground, the statute of New York providing that the widow may, at any time during her life, demand her dower. To have limited the complainant to any

¹ *Parker v. Obear*, 7 Met. 24; ante, § 8.

² But where a widow is beyond seas, and so within the saving clause of the statute, equity will not let the staleness of her claim be set up to bar dower. *Larrowe v. Beam*, 10 Ohio, 498.

³ *Tuttle v. Willson*, 10 Ohio, 24.

⁴ *Jones v. Powell*, 6 John. Ch. 194; ante, § 5.

number of years, therefore, for the exercise of that right, would have repealed both the letter and the spirit of the Act. The statute of Ohio, however, contains no words of similar import. It enacts 'that the widow shall be endowed of one full, equal third part of all the lands, tenements, and real estate of which her husband was seized as an estate of inheritance at any time during the coverture,' &c., but is silent as to the time within which the right shall be asserted. The Act of 1810, provides, 'that no person or persons shall hereafter sue, have, or maintain any writ of ejectment, or other action for the recovery of the possession, title, or claim, of, to, or for any land, tenements, or other hereditaments, but within twenty-one years next after the right of such action or suits shall have accrued,' &c.¹ It will be seen that it is not only an action of ejectment which is barred by this statute, but every other action for the recovery of the possession, title, or claim to any land. The petition for dower is substantially, when prosecuted, a possessory action. Its object is, the recovery of a private right, the possession of lands, in which the complainant has an estate for life, and would seem to be within the letter of the Act. It is, however, a general rule, both in England and the United States, that statutes of limitation do not, *ex vi termini*, extend to suits in chancery, yet courts of equity in both countries constantly admit their obligation, and act, not only in analogy, but in obedience to their provisions. It is, indeed, well settled that a statute of limitations will now be applied in equity, where it would bar the claim at law.² Seaman died in 1815. The right to dower accrues upon the death of the husband. The complainant filed her petition in 1838, a period of twenty-three years having elapsed after her cause of action arose, and, in our view, the statute is a bar to her claim. But if it were otherwise, the staleness of the demand would be fatal to its farther prosecution, and, independent of the Act of limitation, afford a complete defence. Where rights are unreasonably neglected, the presumption is legitimate of an intention to abandon them."

14. The general equity doctrine above referred to, is thus stated by Judge Story:³ "A defence peculiar to courts of equity, is that founded upon the mere lapse of time, and the staleness of the claim, in cases where no statute of limitations directly governs the case. In such cases, courts of equity act sometimes by analogy to

¹ 1 Chase's Stat. 656.

² 1 Story's Eq. 502; 2 Ibid. 735; 6 Peters, 66.

³ 2 Story's Eq. § 1520.

the law, and sometimes act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights."

15. It was upon this principle that a claim for dower was disallowed in Kentucky, in the case of *Ralls v. Hughes*.¹ It was there held that "the right of dower is not embraced by the statute of limitations; but in chancery, this, like every new right of action in equity, must be acted on at the utmost within twenty years." "Courts of equity," said the court, "not merely adopt the time prescribed by the statute, in all cases where it applies expressly, or by analogy, but even in those for which it has made no provision, on the general principle that vigilance and activity are necessary to call forth the extraordinary powers of the court, and that where a party has slept upon his claim for twenty years, good policy requires he should be left to his common law remedy. Concurring entirely in the wisdom of the policy that dictated the rule, we are so far from feeling any disposition to disregard or evade it for any purpose, that we should have felt inclined to originate it if it had never heretofore been adopted."² It has been recently determined in Kentucky, however, that a widow's right to dower accrues upon the death of her husband, and that she will be barred by the statute of limitations if she fail to sue within the time allowed by law.³

16. In Maryland, in the case of *Wells v. Beall*,⁴ it was held by Bland, Chancellor, that the statute of limitations is no bar in equity to a proceeding for dower, or for rents and profits accruing by reason of the right. In *Steiger v. Hillen*,⁵ decided shortly afterwards, a bill filed by the administrator of a widow to recover, in lieu of dower, a proportion of the rents and profits of land which had been sold on execution against the husband in his lifetime, was dismissed on account of laches in asserting the claim, a period of about twenty-one years having intervened between the death of the husband and the death of the widow. In *Sellman v. Bowen*,⁶ it was held, that the alienee of a husband, seized of land after the

¹ *Ralls v. Hughes*, 1 Dana, 407.

² See *Robinson v. Miller*, 2 B. Mon. 284, 287.

³ *Kinsolving v. Pierce*, 18 B. Mon. 782.

⁴ *Wells v. Beall*, 2 Gill & J. 468.

⁵ *Steiger v. Hillen*, 5 Gill & J. 121.

⁶ *Sellman v. Bowen*, 8 Gill & J. 50.

husband's death, who receives the rents and profits, is considered in equity as a trustee or bailiff to the extent of the widow's claim for dower, and can not defeat the claim for mesne profits by pleading the statute of limitations. In *Kiddall v. Trimble*,¹ it was said, that the statute "does not apply to the wife's remedy by action for her dower, though it does not follow that lapse of time may not operate as a bar to a bill for an account." In a later case,² an annuity given by will to a widow in lieu of dower, became payable in 1818. No part of it was paid, and no legal steps taken to enforce the payment until in 1846, when the widow filed a bill claiming the whole amount of the annuity, with interest, as a charge upon the lands (then in the possession of *bonâ fide* purchasers) devised to the parties who were by the will required to pay it. It was held, that the laches and lapse of time were an effectual bar to the claim. And the fact that the widow did not know that the annuity was a charge upon the lands until in 1839, when she was informed of it by a decision in the court of appeals, was regarded as furnishing no excuse for the neglect and delay to proceed against the parties personally responsible for the payment of the annuity.

17. In Tennessee, in the case of *Guthrie v. Owen*,³ it was decided, that where dower has not been assigned to a widow in the lands of her deceased husband, a possession of seven years by the heirs, or those who come in under them, will not bar her right under the Act of 1819.⁴ The question was very fully discussed by the court. "A widow in England," they said, "is not barred of her dower by the statute of 32 Hen. VIII., ch. 2, because those who are barred by that statute must count either on their own seizin, or that of an ancestor, and the widow, before assignment, has no seizin in the lands of which she is dowable, nor does she count on the seizin of any ancestor. She is not bound by the Act passed for the limitation of actions (21 James I., ch. 16), for that Act barred the right of entry to those who for twenty years after the accrual of such right, omit to enter, or bring their suits. But the widow, before assignment of her dower, has no right of entry upon the premises of which she is dowable, and therefore, her right of entry not existing, and that statute operating only upon such right, her title is unaffected by it. But it is said that the statute of fines and proclamations,⁵ Rich. III., ch. 7, or rather the statute which re-enacts

¹ *Kiddall v. Trimble*, 1 Md. Ch. Dec. 143, 150.

² *Chew v. Farmers Bank*, 9 Gill, 361.

³ *Guthrie v. Owen*, 10 Yerg. 339.

⁴ Act of 1819, ch. 28, § 2.

⁵ Ante, §§ 1, 2.

that, 4 Hen. VII., ch. 24, will bar the title to dower. This position, though in early times contradicted by Plowden, and as to its principle, questioned and criticised in modern times by Preston, is yet well established.¹ If a fine with proclamations be levied, the seizin and title of the person in whose favor it is levied become or are taken as paramount to the title of the heirs and of the widow, and are inconsistent with her claim, and if she omit, for the five years given by the saving of the statute, to make her claim, it becomes barred by such fine and non-claim. A fine is a conveyance of record, and although the proceeding is fictitious, yet it appears of record that the purchaser has a title, not only adverse, but paramount to that of the husband, or his heir who has suffered the recovery; and the right of dower, consequently, would not exist at all, had not the statute seen proper, because the proceeding was but a fiction, to annex a saving, and this saving extending to five years only, if there be no claim within that period, the claim is of course barred. But very different are the relations existing here in point of title between the widow and the heir, when we come to the inquiry whether the widow be barred of her dower by the second section of the Act of 1819, ch. 28. Neither the title nor the possession of the heir is adverse to that of the claimant of dower, nor is it in any way inconsistent with it.² The title to dower is involved with and inherent in that of the heir; his seizin and possession, although for himself, inures also to the benefit of the claimant in dower; his possession, indeed, may protect, but it can not destroy the right to dower, unless the second section of the Act in question shall constrain us to give to it an effect so little in harmony with the relations which exist between the title of the heir and the dowress. But we do not think that section creates a bar to the assertion of the widow's right to dower: 1st. Because, as we have already said, the title and possession of the heir are not inconsistent with the claim for dower. Their operation should sustain, not destroy—should give effect to, not defeat the title in

¹ Ante, § 1, and note.

² In Pennsylvania, a widow who remains in the possession of land of which her husband died seized and possessed, will not be permitted to claim title adversely to her children by the statute of limitations; her possession, under such circumstances, is that of her children; and if she marry again, the possession of her and her husband will be as well for the children as themselves. *Cook v. Nicholas*, 2 Watts & Serg. 27. The rule is the same in Kentucky, unless the possession of the widow is openly and notoriously declared to be adverse. *Driskell v. Hanks*, 18 B. Mon. 855.

dower. 2d. Because, while the law gives to the widow no right of entry upon the lands of the heir of which she is dowable, but her remedy for the assertion of her claim lies in action only; it imposes upon the heir as an active and continuing duty towards the dowress, that he should himself assign to her the dower to which she may be entitled. 3d. Because, whatever different views may be entertained with regard to the first and second sections of the Act of 1819, all will perhaps agree, that the leading policy, the main scope, the end and aim of both are to protect those in possession of real property against claims, whether legal or equitable, which those who are out of possession hold adversely against such persons in possession; yet to embrace a case of dower not only affects a claim which is not adverse to that of the heir, as we have shown, but in fact makes the possession one way or the other, altogether immaterial in reference to the statutory bar. For, if the second section of the statute will, in behalf of the heirs, bar the widow at all, it will do so in a case where the lands being wild, neither party is in actual possession; nay, more, the bar will exist in a case where the widow continues from the death of her husband to reside for seven years upon the premises in which she seeks to be endowed, and then brings her suit for the assignment of dower. 4th. Because the construction of the second section of the Act of 1819, which would bar the widow of her dower in favor of the heir, would also create a bar in the case of a technical continuing trust. We do not think such was the object of the statute. In this case, indeed, it is not the heir, but a purchaser of his title, who insists upon the statute of limitations. But we think that the same relation exists between such purchaser and the claimant of dower, and the title remains in precisely the same attitude as in the case of the heir himself."¹

18. In the subsequent case of *Carmichael v. Carmichael*,² it was decided, that where there has been such an adverse possession by a stranger as will bar the right of the heirs, the right of dower is also barred. In that case, lands of a deceased husband had been sold under a void judgment, and were afterwards conveyed by the purchaser to one of the defendants in the action before he had received his deed from the sheriff. Possession was voluntarily

¹ See *Smart v. Waterhouse*, 10 Yerg. 94.

² *Carmichael v. Carmichael*, 5 Humph. 96.

relinquished by the widow, and she failed to assert her right to dower by suit for twenty years thereafter. It was held that she was barred. "This case," said the court, "differs widely from the case of *Guthrie v. Owen*, in its facts, and consequently the decision of it must be controlled by entirely different principles. In that case, *Owen* held under the heirs, and was clothed with the title of the heirs, and was consequently held to be in no better situation as regards the widow's right of dower than the heirs would have been. In this case, *Williams* [the tenant in possession] holds under a deed from *Daniel Carmichael*, [the purchaser at the sheriff's sale,] made when he did not pretend to have any title, and consequently, unless *Carmichael* afterwards became vested with the title of the heirs, the possession of *Williams*, for twenty-five years, has been held under the deed of a stranger to the title, and adversely to the heirs. But the bill alleges, and so the fact is, that the proceedings by *sci. fa.* to subject the land of the heirs to the satisfaction of the judgment against their administrator were wholly void, the *sci. fa.* not having been served on them, but on their guardians only. *Williams's* possession under the *Carmichael* deed is therefore a bar to the right of the heirs, or such of them as were twenty-one years of age, three years before this bill was brought; and as the right to dower is connected with and inheres in the title of the heirs, that which operates as a bar to their title is a bar to the right of dower. But we think, if the proceedings against the heirs had been regular, so that the defendant *Williams's* possession had been taken and held by virtue of a title derived from the heirs, the circumstances of the case are such as that, coupled with the great length of time that has elapsed, ought to repel the complainant's right to dower. She admits in her bill that she concurred in the sale of the land and voluntarily relinquished possession of the premises. True, she alleges that she did so, under the influence of ignorance of her rights, and delusive and false promises of the defendant *Carmichael*; but we must regard her as having knowledge of the law of her case, and the allegation of fraud is denied and not proved. We have, then, the case of an agreement of a dowress for the sale of the land, a voluntary relinquishment of possession, and a forbearance to assert her claim to dower for more than twenty years. The defendant, *Williams*, too, purchased under the influence of this abandonment of her claim for dower, and has for twenty years held possession of the land so purchased, in the full confidence that

he had a good title, free from all incumbrance. Under these circumstances, we think it would be inequitable now to permit the complainant, through the aid of this court, to assert a right thus abandoned, which she has permitted to lie dormant so long."

19. In North Carolina, in the case of *Spencer v. Weston*,¹ it was adjudged that the claim which a widow has for dower in the lands of which her husband died seized, is not, before assignment, a "right or title" to the land within the meaning of the Act of 1715,² and is not, therefore, barred by the limitation of that Act. The court said: "The third section of the Act of 1715 declares that 'no person or persons, nor their heirs, which shall hereafter have any right or title to any lands, &c., shall thereunto enter or make claim, but within seven years next after his, her, or their right or title shall descend or accrue; and in default thereof, such person or persons so not entering, or making default, shall be utterly excluded and disabled from any entry or claim thereafter to be made.' It is very clear that the plaintiff could not enter, because she had no estate in the lands to enter upon. But she had an interest, a right to have one-third of the lands assigned her by metes and bounds for life. Must she 'make claim' of this interest in seven years, or be barred of her right of dower by an adverse possession for that length of time? A widow, before assignment of dower, has neither 'any right or title' to the lands of which her husband was seized; she has only an interest in the lands for dower; therefore we think the Act of 1715 can not be pleaded as a bar of her action to recover the same." The same doctrine was applied to the case of *Campbell v. Murphy*.³ "The statute of limitations to a 'writ of right,' " said the court in that case, "is sixty years; to a formedon, fifty years, (afterwards reduced to twenty); to a writ of entry, thirty years. The writ of dower is in the nature of a writ of right; there is no statute of limitations in regard to it; for the reason, we suppose, that none was thought necessary; for the right ceased at the death of the widow, which would, in most cases, happen before the expiration of sixty, fifty, or even thirty years."⁴ So in Missouri, the Act limiting actions for the recovery of real estate, is held not to apply to suits for dower.⁵

¹ *Spencer v. Weston*, 1 Dev. & Bat. 213.

² Rev. ch. 2, § 3; Rev. Stat., ch. 65, § 1.

³ *Campbell v. Murphy*, 2 Jones, Eq. 357.

⁴ See *McMillan v. Turner*, 7 Jones, L. 435.

⁵ *Littleton v. Patterson*, 32 Misso. 357.

20. In Georgia, it has been several times decided that the statute of limitations of 1767¹ is no bar to a proceeding for dower.² "By that Act," observed the court, in *Tooke v. Hardeman*,³ "all suits or actions for land are required to be instituted within seven years after the title or cause of action shall or may descend or accrue to the same, and at no time after the said seven years. The argument for the plaintiff is, that this is a *suit* by the widow to obtain possession of the land. It is an application by the widow to have her dower assigned to her, and to that extent it may be considered a suit; but in our judgment, the application by a widow to have her dower assigned to her in the lands of her deceased husband, is not a suit to recover the possession of the land which may be so assigned. The widow could not enter upon the land for her dower until it had been assigned to her; nor could she have sustained an action of ejectment for her dower before the assignment thereof. The cause of action to recover the *possession* of the land did not accrue to the widow until after the assignment of her dower; consequently the statute of 1767 did not run against her; and her application for such assignment is not within the provisions of that Act."⁴ It was also held, in *Chapman v. Schroeder*,⁵ that the right of dower is not barred by lapse of time merely, independent of any equitable circumstances.

21. The present statute of Georgia, however, in force since 1839, requires the widow to make application for her dower within seven years after the death of her husband, or she will be barred.⁶ But this enactment operates prospectively only, and does not apply to cases where the husband died before its passage.⁷

22. In Mississippi, an action for dower is regarded as a possessory action within the statute limiting such actions to twenty years from the time the right accrues; and the right of the widow is held to accrue at the death of her husband.⁸ In Alabama, in the case of *Owen v. Slatter*,⁹ the general statute of limitations was pleaded as a defence to an action for dower, but the court did not decide

¹ Prince, 573.

² *Wakeman v. Roache*, Dudley, 123; *Tooke v. Hardeman*, 7 Geo. 20; *Chapman v. Schroeder*, 10 Geo. 321.

³ *Tooke v. Hardeman*, *supra*.

⁴ See, also, the elaborate opinion of the court in *Wakeman v. Roache*, Dudley, 123.

⁵ *Chapman v. Schroeder*, 10 Geo. 321.

⁶ Cobb's New Dig., p. 230, § 1; Act of Dec. 21, 1839.

⁷ *Tooke v. Hardeman*, *supra*. See ante, § 7.

⁸ *Torrey v. Minor*, 1 Smedes & M. Ch. 489. ⁹ *Owen v. Slatter*, 26 Ala. 547.

whether the bar applied.¹ By the code of 1852, of that State, all suits for dower are barred after three years.² An amendment adopted in 1858, limits the operation of this statute to cases where "the claim or rights of an alienee of the husband, or any one claiming under such alienee, are involved" in the suit or proceeding.³ But this amendatory Act does not revive a right of action already barred under the code at the time of its passage.⁴

23. In South Carolina, it has been decided in numerous cases, that actions for dower are within the general statute of limitations.⁵ In *Ramsay v. Dozier*,⁶ the subject was discussed by Nott, J., as follows: "The question is, whether the statute of limitations will bar dower. The words of our Act are, 'If any person to whom any right or title to lands, tenements, or hereditaments shall descend or come, do not prosecute the same within five years after such right or title averred [accrued], then he, she, or they, shall be for ever barred to recover the same.' These words embrace a right to dower, as well as any other right to lands or hereditaments. Mrs. Ramsay's right accrued at her husband's death, and the statute then began to run." . . . Brevard, J.: "It is true, dower is favored in law, and the Act of limitations being in restraint of the common law, is to be construed strictly; but it is equally true, that the Act of limitations in this State, plainly and certainly limits the right of action to recover the possession of lands, to five years after the time when the right of the party accrued, descended, or came; and declares that all claims to lands shall be by action or suit at law in the court of common pleas. In the case of *Elizabeth Lide v. Edward Reynolds*,⁷ decided in Columbia in 1802, it was determined that the statute of limitations may be a bar to dower. The late Judge Wilds, then at the bar, was retained by one of the parties, and took considerable pains to investigate the subject; the result of his researches was a settled opinion that the plea was certainly good."⁸

¹ See Clay's Ala. Dig., p. 174, § 12.

² Ala. Code, 1852, § 1372.

³ Act of Feb. 8, 1858; Ala. Laws, 1857-8, p. 47.

⁴ *Martin v. Martin*, 35 Ala. 560.

⁵ *Lide v. Reynolds*, 1 Brevard, 76; *Mitchell v. Poyas*, 1 N. & M. 85; *Ramsay v. Dozier*, 1 Con. Court, (Treadw.) 112; *Boyle v. Rowand*, 3 Desaus. 555; *Rickard v. Talbird*, Rice, Eq. 158; *Wilson v. McLenaghan*, 1 McMullan, Eq. 35; *Stoney v. Bk. of Charleston*, 1 Rich. Eq. 275; *Caston v. Caston*, 2 Rich. Eq. 1. See *Brown v. Spann*, Mills, Con. Court, 240.

⁶ *Ramsay v. Dozier*, *supra*.

⁷ *Lide v. Reynolds*, *supra*.

⁸ *Smith, J.*, dissented.

24. In *Wilson v. McLenaghan*,¹ the husband of the dowress died in 1823, and the executor, immediately upon his death, took possession of the real estate, and held it until 1827, when it was sold by the sheriff by virtue of an execution obtained against the executor. Possession was held by the purchaser continuously (including the time from the death of the testator to the sheriff's sale) for more than twenty years. This was adjudged to be a good bar of dower under the statute of limitations. In *Caston v. Caston*,² it was decided that the possession of a devisee may be connected with the possession of a purchaser from him, so as to defeat, under the statute of limitations, the right of the widow of the testator to dower in the premises, although neither the possession of the devisee nor that of the purchaser was for ten years. In the case of *Rickard v. Talbird*,³ the following proposition was laid down by the court: "The right to dower accrues upon the death of the husband, but the course of our decisions has been to date the running of the statute of limitations, not from the accrual of the *right*, but from the accrual of the *right of action* for its assertion. So that the statute does not begin to run until there is a possession in some one adverse to the claimant of dower." This proposition, however, is opposed to decisions previously made in the courts of South Carolina.⁴

25. In Michigan, in the case of *May v. Rumney*,⁵ it was determined, that actions for the recovery of dower are not within the general statute of limitations. The statute under which that case arose, provided, "that no writ of right, or other real action, no action of ejectment, or other possessory action of whatsoever name or nature, shall hereafter be sued, prosecuted or maintained for the recovery of any lands, tenements, or hereditaments, unless the same be brought within ten years after the passing of this Act, any law, usage, or custom to the contrary, notwithstanding."⁶ "This statute," said the court, "seems to be broad enough to cover all possible remedies for the recovery of an interest in lands, and yet it does not in terms enumerate the action of dower." After an extended discussion of the subject, the court arrived at a conclusion which is thus expressed: "The right to dower is unlike any other right to land known to the law, and its peculiar nature is such as to exempt

¹ *Wilson v. McLenaghan*, 1 McMullan, Eq. 35.

² *Caston v. Caston*, 2 Rich. Eq. 1.

³ *Rickard v. Talbird*, Rice, Eq. 158.

⁴ See cases cited in the preceding section.

⁵ *May v. Rumney*, 1 Mann. 1.

⁶ Act of Nov. 5, 1829, § 1; Laws 1833, p. 408.

it from the operation of all general statutes of limitation, however broad and comprehensive, in which it is not named, or by unavoidable implication included."

26. In Iowa, it has been held, that the statute of limitations¹ in force in that State prior to the adoption of the code, was similar to the English statute of 32 Henry VIII., ch. 2,² and 21 Jac. I., ch. 16, and that it did not bar an action for the recovery of dower.³ But such an action is within the general statute of limitations, (chapter 99 of the code), and will be barred in the same time with other actions for the recovery of real property.⁴ And courts of equity, equally with courts of law, are bound by the statute.⁵ The Indiana statute of 1843,⁶ barred proceedings to recover dower after the expiration of twenty years from the death of the husband.⁷

27. From the authorities referred to in this chapter, it will be seen, that a difference of opinion prevails as to the applicability of general statutes of limitation to actions for dower; some of the courts holding that such actions are not barred unless expressly included by name; and placing their decision, in several of the cases, upon the ground that a right of action does not accrue to the widow within the meaning of the limitation Acts, until there is an actual adverse possession under a conflicting claim of title. The general doctrine in regard to the limitation of actions is, "that the cause of action or suit arises when and as soon as the party has a right to apply to the proper tribunals for relief."⁸ In many of the States, the widow has the right by law to proceed for the recovery and assignment of her dower immediately upon the death of her husband. It is immaterial to her whether the heir, or a stranger asserting an adverse title, is in possession; her right of action is as perfect and complete against the one as against the other. In this respect there is an essential difference between the case of a dowress and the case of a party having title to lands. Until the possession

¹ Rev. Stat. 1843, ch. 94.

² Ante, §§ 1, 2.

³ *Phares v. Walters*, 6 Clarke (Iowa), 106.

⁴ *Ibid.* By the Revision of 1860, (§ 2428), application for the admeasurement of dower must be made within ten years after the death of the husband.

⁵ *Phares v. Walters*, *supra*.

⁶ Rev. Stat. Ind. 1843, p. 811, § 112. There was a saving clause as to widows under the age of twenty-one, or insane. *Ibid.*

⁷ See *Harding v. Presb. Church*, 20 Ind. 71, 73; 2 Rev. Stat. Ind. 1852, p. 76, § 212.

⁸ Angell, Limitations, § 42.

of the latter is disturbed or invaded, no cause of action arises in his favor; and consequently, until that time, the statute can not commence to run against him. But as the widow may assert her claim, and bring her action at once, it would seem, upon the principle above laid down, that it should be considered as coming within the operation of the statute. In several of the decided cases, as has been shown, it is held that the right of action to recover dower accrues upon the death of the husband, and that the statute begins to run from that time.¹ In some of the States, a widow can not bring her suit for dower until after a demand for its assignment has been disregarded by the tenant.² Where enactments of this character are in force, the statute begins to run from the time when her right accrues to a writ of dower, after demand, and not from the time when she became entitled to her dower upon the death of her husband.³

28. It is well settled, in accordance with sound principle and the manifest justice of the case, that an adverse occupation of the premises during the life of the husband, will not affect the rights of the widow.⁴ She can not be prejudiced by the laches of her husband in this particular, and the statute does not begin to run against her claim of dower until after his death. "Upon the principle on which statutes of limitation are enacted," said the court in *Durham v. Angier*,⁵ "that of negligence or laches in the party debarred, no statute of limitations could justly be held to run against her until after that time." "The statute is in terms broad enough to embrace this case," remarked Richardson, C. J., in *Moore v. Frost*;⁶ "but every statute is to have a reasonable construction, according to the true intent and meaning of the legislature. The principle upon which the statute of limitations is founded, is, that he who has cause of action, and neglects to avail himself of the remedy which the law furnishes, within the time limited, shall be presumed to have abandoned his right, and shall be for ever barred of his remedy.

¹ *Ramsay v. Dozier*, 1 Con. Court, (Treadw.) 112; *Tuttle v. Willson*, 10 Ohio, 24; *Kinsolving v. Pierce*, 18 B. Mon. 782; *Torrey v. Minor*, 1 Smedes & Marsh. Ch. 489; *Berrien v. Conover*, 1 Harrison, 107; *Conover v. Wright*, 2 Halst. Ch. 613; *Phares v. Walters*, 6 Clarke (Iowa), 106.

² Ante, ch. vi., §§ 1, 2.

³ *Robie v. Flanders*, 33 N. H. 524.

⁴ *Durham v. Angier*, 20 Maine, 242; *Moore v. Frost*, 3 N. H. 126; *Hart v. McCol-lum*, 28 Geo. 478.

⁵ *Durham v. Angier*, *supra*.

⁶ *Moore v. Frost*, *supra*.

But a wife, during the life of the husband, has in his lands only a future contingent interest, a mere expectancy, which can not be affected by any act of the husband, nor of any third person. If, then, the statute embraces a wife's right of dower, and begins to run from the time when the husband ceases to be seized, she will be deprived of her dower in every case where twenty years elapse after a conveyance of the land by the husband and before his death; and this without any neglect or laches on her part. It seems to us that this would be unreasonable; and we think it is very apparent, from the language of the proviso to the statute now under consideration, that the statute was intended to bar only those, who, being entitled to make an entry into lands, or to bring an action for the recovery of lands, rents, &c., neglect to avail themselves of those remedies within the time limited. For it can never be supposed, that the legislature could have intended to save from the operation of the statute the interests of a *feme covert* in cases where she and her husband might have a remedy, and avoid the effect of the statute, and yet leave the statute to run against her rights in instances where she could have no power to do anything to save her rights from its operation." The same conclusion was arrived at in *Hart v. McCollum*.¹ "The mere failure of the husband to sue for lands of which he was once legally seized during the coverture," it was there declared, "until the statute of limitations attaches as against him, does not exclude the wife's right to dower in said lands,—a right which she may assert when she becomes discovert."

¹ *Hart v. McCollum, supra.*

CHAPTER XXI.

ASSIGNMENT BY METES AND BOUNDS AS AGAINST THE HEIR OR DEVISEE OF THE HUSBAND.

§ 1. Introductory.	23-28. In mines.
2, 3. Notice of the admeasurement not required.	29. Alternate enjoyment.
4-16. Duty of the sheriff or commissioners in making the assignment.	30-34. Improvements by the heir.
17-20. Assignment in separate tracts.	35, 36. Depreciation in value after the husband's death.
21. In estates held in common.	37-40. Mode of ascertaining the widow's proportion.
22. In leasehold estates.	

Introductory.

1. It has been shown in a previous chapter,¹ that in all cases in which the qualities and condition of the property and the nature of the husband's estate therein will admit of it, the rule of law requires that the dower of the widow shall be assigned to her by metes and bounds.² It is proposed now to consider the proper application of this rule to cases where the widow has recovered judgment for her dower against the heir or devisee of her husband, or against a purchaser from either.³

Notice of the admeasurement not required.

2. It is not necessary, in most of the States, to give notice of the execution of a commission to lay off dower, to the heir or tenant who is party to the suit.⁴ And where the admeasurers met at the house of the heir, and requested him to show the premises, and he

¹ Ante, ch. iv., § 16.

² Perkins, § 414; Co. Litt. 34 b.; Park, Dow. 251; 4 Kent, 63; Pierce v. Williams, 2 Penning. 709. The subject of the assignment of dower specially in the rents and profits, where the property is indivisible, is considered post, ch. xxiii.

³ As to assignment where judgment has been recovered against the alienee of the husband, see the next chapter.

⁴ In the Matter of Watkins, 9 John. 245; Ridgway v. Newbold, 1 Harring. 385; Beaty v. Hearst, 1 M'Mullan, 31.

refused to have anything to do with the business, this was held a sufficient notice, if any was required, and a waiver of all further notice.¹

3. By statute in Rhode Island² and Georgia,³ the commissioners appointed to set off the dower, are required to give the parties interested notice of the time and place of making the assignment.

Duty of the sheriff or commissioners in making the assignment.

4. The sheriff is a mere ministerial officer, and can only assign dower according to the mode prescribed by law and the tenor of the writ addressed to him by the court.⁴ If, therefore, the subject out of which dower is to be assigned be divisible, and he do not return that he has delivered seizin of a third part of it by metes and bounds, the assignment can not be supported.⁵ The same general doctrine applies where, by statute, the duty of making the assignment is withdrawn from the sheriff and devolved upon commissioners appointed by the court.⁶

5. If the sheriff discharge his duty vexatiously and maliciously, he will be punished by the court and the assignment set aside. An instance of this occurred in Abingdon's case.⁷ There, the sheriff returned that he had assigned dower to the widow of a house, viz., a third part of each chamber, and that he had chalked out each

¹ In the Matter of Watkins, *supra*.

² Rev. Stat. R. I. 1857, p. 505, § 12.

³ Cobb's New Dig., p. 229, §§ 1, 5.

⁴ 1 Roll. Abr. 683, pl. 35.

⁵ 1 Roper, H. & W. 394; 1 Washb. R. P., 2d ed., 234; Pierce v. Williams, 2 Penning. 709.

⁶ In Indiana, the assignment by the commissioners simply ascertains and limits the extent of the dower, but does not confer a right to the estate itself. Hence, the claim of the widow, even after assignment, must yield to a paramount title. *M'Mahan v. Kimball*, 3 Blackf. 1. Where commissioners to assign dower neglect or refuse to act, the court is authorized to appoint new ones in their stead; and this power exists independently of the statute. *McCormick v. Taylor*, 5 Ind. 436. In Virginia, an assignment of dower made by commissioners under an order of court, at the instance of one of several co-heirs, is binding on the widow, provided it be a full and just assignment; and it is binding also on the co-heirs, even if they are infants, provided it be not excessive. *Moore v. Waller*, 2 Rand. 418. In Missouri, the widow electing to take a child's share under the statute, (1 R. C. 1855, p. 670, § 11,) is to be considered as a dowress; and the setting off to her a child's share, in partition, is an assignment of dower. *Orrick v. Robbins*, 34 Misso. 226. See *Lecompte v. Wash*, 9 Misso. 551, for an account of the early legislation in Missouri in regard to the assignment of dower.

⁷ Abingdon's case, cited Palm. 265.

part for her. It was determined that this was an idle and malicious assignment, and the sheriff was committed to prison.¹

6. But it has been held, that when the subject of the assignment is a dwelling-house, as in the case above referred to, the *whole* of particular rooms may be set off for dower.² In a case in New York, where the premises in which dower was claimed consisted of a village lot with a dwelling-house thereon, particular rooms in the house were assigned to the widow, with the right of using the stairways, halls, &c., so as to afford ingress and egress for the enjoyment of the rooms; and it was decided, that no legal objection to the assignment could be made by the tenant.³ Whether the widow could object was not determined, but Bronson, J., remarked: "In a case like this, where there are no other lands in which the dower may be assigned, I think the widow could not refuse to take a part of the house." So in *Parks v. Hardey*,⁴ it was said that there seems to be no objection, in admeasurement of dower, to setting apart particular rooms for the widow, with her consent, with the use of the halls and passage ways.⁵

7. In a case⁶ in Massachusetts, upon an assignment of dower, there was set off to the widow the southerly half of a dwelling-house, "that is, the southerly front room, and the bedroom aback of it, with the chamber and garret over the same, and the cellar under it, with liberty to use the chamber and garret stairs and the entries," "and liberty to use the kitchen" (which was in the northerly half of the house) "for washing and cooking when she may need; also liberty to use the yard and well." No question seems to have been made as to the legality of the assignment. It appeared in the case that the only way within doors to the cellar, was through the kitchen, but that there was a way thereto outside; and one point determined was, that the widow acquired no right of passage to the cellar through the kitchen, under the assignment, in the absence of express words to that effect. In a case⁷ in New York, the report of the admeasurers stated that they had "set off to the

¹ In another case, the sheriff was committed for taking 60*l.* to execute his writ, and the court ordered that the assignment of dower, being under value, should be amended. *Longvill's case*, 1 Keb. 743; *Park, Dow.* 272.

² *Palm.* 264; *Doe dem. Riddell v. Gwinnell*, 1 Q. B. 682; 1 Gale & D. 180; 1 Bright, H. & W. 372, pl. 40; *Perk.* § 342. See ante, ch. iv., §§ 16-21.

³ *White v. Story*, 2 Hill, 543.

⁴ *Parks v. Hardey*, 4 Bradf. 15. And see *Stewart v. Smith*, 39 Barb. 167.

⁵ See, also, *Patch v. Keeler*, 27 Verm. 252; post, § 13.

⁶ *Symmes v. Drew*, 21 Pick. 278. ⁷ In the Matter of *Watkins*, 9 John. 245.

widow the *land* by metes and bounds, out of 140 acres, and the common use of the entry and stairs of the dwelling-house, above and below stairs, and the right of partitioning off part of the cellar for her separate use, the privilege of using the well, room for a cow yard, and the separate use of the horse shed," and the assignment was sustained.

8. In Illinois, the widow may have the homestead or dwelling-house included in the assignment, if she desire it.¹ In Iowa, unless the widow prefer a different arrangement, the share set off to her is to embrace the ordinary dwelling-house and the land given by law to the husband as a homestead, or so much thereof as will be equal to the proportion allowed her by the statute.² But no different arrangement is permitted where it will prejudice the rights of creditors. In Arkansas, it is made the duty of the commissioners, if the estate will permit of it without essential injury, to so lay off the dower as to include the usual dwelling-house in the assignment to the widow;³ but at her request they may lay it off on any part of the lands, provided it can be done without material injury to the estate.⁴ In Alabama,⁵ Mississippi,⁶ Florida,⁷ Tennessee,⁸ and North Carolina,⁹ the portion assigned to the widow shall comprehend the dwelling-house in which the husband was accustomed to dwell, together with the offices, outhouses, buildings, and other improvements appertaining thereto; but if it shall appear to the court that the whole of the dwelling-house and other improvements can not be applied to the use of the widow without manifest injustice to the heirs, then the widow is to take such part only as the court shall deem reasonable and just. In Florida, the part so set off shall not be less than one-third. In North Carolina and Ten-

¹ 1 Stat. Ill. 1858, p. 155, § 25. Commissioners appointed to set off dower have no authority to make partition of the land among the parties entitled thereto. *Loyd v. Malone*, 23 Ill. 43.

² *Laws of Iowa*, Rev. of 1860, p. 415, § 2426.

³ *Dig. Stat. Ark.* 1858, p. 453, § 19.

⁴ *Ibid.* § 20; *Act of Jan. 15, 1857*. See *Hill v. Mitchell*, 5 Ark. 608, 619; *Morrill v. Menifee*, *Ibid.* 629.

⁵ *Clay's Dig.*, p. 172, § 3.

⁶ *Rev. Code Missis.* 1857, p. 161, art. 162. In this State, the statute providing for the assignment of dower, regards the children of the former marriage, in determining the extent to which the wife of the second marriage is dowerable. *Whitehead v. Middleton*, 2 How. (*Missis.*) 692.

⁷ *Thompson's Dig.*, p. 184.

⁸ *Code Tenn.* 1858, p. 474, §§ 2401, 2402.

⁹ *Rev. Code N. C.* 1855, p. 601, § 1.

nessee, she is to have such portion as will afford her a decent residence, regard being had to her rank and past manner of life.

9. In Alabama, under the statute above referred to, a widow is not dowable, as a matter of right, of the entire dwelling-house, outhouses, &c., of her husband; but only of such part thereof as corresponds with her dower interest in the lands. If the estate be solvent, and it will not be unjust to the heirs, she may insist on the entire dwelling-house, outhouses, &c., being assigned as part of her dower, in lieu of a corresponding portion of her dower in the lands, equal in value to the portion of the dwelling-house of which she is not dowable as a matter of right.¹

10. The law will not permit an assignment to the widow of all the husband's real estate, even where it is supposed to be necessary for her support.² This point was determined in North Carolina, in a case³ which involved the construction of the Act of 1784.⁴ That Act gives to the widow one-third of the real estate of which her husband died seized, in which is to be comprehended the mansion-house and offices; or if the whole mansion-house and offices can not be included without injustice to the children, then such portion thereof as may be sufficient to afford her a decent subsistence. It was held, that the mansion-house, or portion of it, is not to be allotted in addition to the third, but as a part of it; and if the whole be set off to the widow when her husband had no other real estate, the return will be set aside.

11. So it is not competent to assign to the widow a portion of the land in fee, equal to her dower in the whole, for this would be in effect to make her a co-heir.⁵ Nor can the privilege be given the widow of cutting firewood and feeding stock upon land not set off for dower.⁶

12. It is not necessary for the sheriff to state in his return the particular fields which he has allotted for the widow's third; it will be sufficient if he mention with certainty and precision of what such third consists. Thus, in *Howard v. Cavendish*,⁷ the sheriff returned that he had delivered seizin to the widow "of one-third part of the

¹ *Langdon v. Stephens*, 6 Ala. 730.

² Perk. § 408; *Stiner v. Cawthorne*, 4 Dev. & B. Law, 501.

³ *Stiner v. Cawthorne*, *supra*.

⁴ Vol. i., ch. ii., § 15.

⁵ *Wilhelm v. Wilhelm*, 4 Md. Ch. Dec. 330.

⁶ *Jones v. Jones*, Busbee's Law Rep. 177.

⁷ *Howard v. Cavendish*, Cro. Jac. 621, pl. 12; Palm. 264.

honour, hundred, tenement, and advowson; viz.: of one tenement or farm in C., called W., then or late in the occupation of A.," &c., concluding, as it is to be inferred, that the delivery was made by metes and bounds of such of the particulars as were capable of it. It was objected that the return was void, since the expressions "tenement or farm" were uncertain, and that an ejectment for a messuage or tenement,¹ or an indictment stating an entry into a tenement or farm, was insufficient, for uncertainty. But the court decided otherwise; observing, that the same particularity was not required in returns of assignments of dower, as in declarations or indictments; and that "messuage or tenement in the tenure of J. S.," was an usual and a good return; more especially, as in the present case the sheriff stated in the conclusion of his return, that he had made a delivery by metes and bounds.²

13. In a case³ in Vermont, commissioners to assign dower, returned that they had set out to the widow "two stalls at the south-west corner of the horse barn, and twelve feet square over said stalls for hay; also three west rows of apple trees on the west side of the orchard, running north and south in the centre between the third and fourth rows." In regard to the stalls and the place provided for the hay, it was held, that the proceedings were not void for uncertainty; and that ejectment would lie to recover possession of the premises described. In reference to the three rows of apple trees, it was decided, that the territory upon which they stood, and all west of a line running north and south between the third and fourth rows was set out, and not simply a right to take and use the fruit from the trees.

14. So it was determined in a case in Alabama, that a description of the tracts allotted as dower, by their designation at the land office, is sufficient, without describing them by metes and bounds.⁴ But in New Jersey, where the sheriff returned to the writ of seizin that he had allotted to the widow one piece of land, giving in his return the metes and bounds; also one-third of the house and barn; the part allotted being in the south end of each; also one-third of the orchard; but no particular part of the orchard being mentioned; the court set aside the return, pronouncing it too vague

¹ *Contra*, 1 Burr. 423, and 1 Term Rep. 11.

² 1 Roper, H. & W. 394. See *Den v. Abingdon*, Dougl. 476; *Fenny v. Durrant*, 1 Barn. & Aid. 40.

³ *Patch v. Keeler*, 27 Verm. 252.

⁴ *Adams v. Barron*, 13 Ala. 205.

and uncertain.¹ "It ought," they said, "to describe the part allotted to the widow by metes and bounds, whenever the subject matter is capable of being so described; a particular end of a house or barn, or a third of an orchard, will not do." And in Kentucky, a return by commissioners, that they had assigned for dower "four acres around the house," was considered too indefinite.²

15. It is not competent to show by parol what lands were included in an assignment of dower. Thus, where the return of commissioners set forth an assignment of "fifty acres of the south-westerly side of said lots," which "said lots" were numbered three and four, parol evidence was held inadmissible to show that the easterly half of lot three was meant to be assigned, and this notwithstanding that the widow had built on that part of the premises and had resided there for forty years.³ It has been held, also, that the return of the sheriff that dower had been set off by three disinterested freeholders, is conclusive, and can not be contradicted by the parties. If not true, the officer is liable to an action for a false return.⁴

16. An assignment to the widow and putting her in possession, is sufficient, though she have a husband.⁵

Assignment in separate tracts.

17. By the common law, if the widow be entitled to dower out of several tracts or parcels of land, the sheriff must assign to her one-third part of each, by metes and bounds.⁶ But if the writ command him to deliver possession of a third part of all lands and tenements, &c., and there are lands in meadow, pasture, and corn, he would act in obedience to the writ by assigning dower *in toto* out of any of these descriptions of lands, and his return to the court of having done so, would be good.⁷

18. It is said⁸ that if the widow be dowable of three manors, the

¹ *Pierce v. Williams*, 2 Penning. 709.

² *Stevens v. Stevens*, 3 Dana, 371.

³ *Young v. Gregory*, 46 Maine, 475.

⁴ *Eastabrook v. Hapgood*, 10 Mass. 313.

⁵ *Adams v. Barron*, 13 Ala. 205.

⁶ Litt. § 36; *Schnebly v. Schnebly*, 26 Ill. 116; *French v. Pratt*, 27 Maine, 381; *French v. Peters*, 33 Maine, 396; *Jones v. Brewer*, 1 Pick. 314; *Wood v. Lee*, 5 Mon. 50; *Scott v. Scott*, 1 Bay, 504; *O'Ferrall v. Simplot*, 4 Iowa, 381; *Corriell v. Bronson*, 6 Clarke (Iowa), 471; *Hill v. Mitchell*, 5 Ark. 608; *Morrill v. Menifee*, Ibid. 629. *Contra*, *Coulter v. Holland*, 2 Harring. 330.

⁷ *Moore*, 19, pl. 66; 1 *Roper*, H. & W. 393. See *Park, Dow*. 255; post, § 19.

⁸ *Moore*, 19.

sheriff may assign one manor to her in lieu of dower out of all ; but this is denied by the court in an anonymous case in Moore,¹ because the widow is entitled by common right to dower of a third of each manor. Mr. Roper considers that the difference probably may be thus reconciled :² “ If the widow recover dower out of three manors, and the writ to the sheriff direct him to assign it out of the three, then his assignment of one manor for dower out of all, will not be good ;³ but that if the direction in the writ be general, to assign dower of all lands and tenements comprised in it, and the parties agree that one manor shall be assigned for dower in respect of all the three,⁴ such assignment will be good.”⁵

19. But Mr. Jacob, observes :⁶ “ Perhaps the authorities in favor of this mode of assigning dower would now prevail, if the manor assigned were equal in value to one-third of the whole. It does not seem to be necessary in all cases, that the widow should have a third of each part of the husband’s estates. Thus, if the husband be possessed of several different mines, it is not necessary that the sheriff should divide each of them ; but he may assign such a number of them as may amount to one-third in value of the whole.⁷ And if one of the husband’s estates had been aliened with warranty, in many cases the whole of the wife’s dower was assigned out of the remaining estates, if sufficient.⁸ In Br. Dower, 72, Littleton reasons on the supposition that the assignment is to be made in the same way as under a writ of partition or an elegit, where a division according to the value is sufficient.”⁹

20. In Massachusetts,¹⁰ Maine,¹¹ Illinois,¹² Kentucky,¹³ South Carolina,¹⁴ Iowa¹⁵ and Arkansas,¹⁶ the rule of the common law, requiring

¹ Page 12, pl. 47.

² 1 Roper, H. & W. 393.

³ Ante, ch. iv., §§ 22–35.

⁴ Ante, ch. iv., §§ 22–35.

⁵ 1 Roll. Abr. 683, pl. 30 ; Moore, 19, pl. 66.

⁶ 1 Roper, H. & W. 393, note.

⁷ 1 Taunt. 411. See, also, 9 Vin. Ab. 257, pl. 13, 14 ; Ibid. 260, pl. 3 ; post, §§ 23, 24.

⁸ Ante, ch. v., § 52 ; post, ch. xxii., §§ 50–52.

⁹ Clarendon v. Hornsby, 1 P. Wms. 446 ; Den v. Abingdon, Doug. 476 ; 1 Bright, H. & W. 368. See Br. Elegit, 14. If the lands have been sold, and are in the hands of different tenants, dower must be assigned in each separate tract. Post, ch. xxii., §§ 2–4.

¹⁰ Jones v. Brewer, 1 Pick. 314.

¹¹ French v. Pratt, 27 Maine, 381 ; French v. Peters, 33 Me. 396.

¹² Schnebly v. Schnebly, 26 Ill. 116.

¹³ Wood v. Lee, 5 Mon. 50.

¹⁴ Scott v. Scott, 1 Bay, 504.

¹⁵ O’Ferrall v. Simplot, 4 Iowa, 381 ; Corriell v. Bronson, 6 Clarke (Iowa), 471.

¹⁶ Hill v. Mitchell, 5 Ark. 608 ; Morrill v. Menifee, Ibid. 629.

dower to be assigned in each separate tract, is treated as in force. But in Delaware, as against the heir, dower may be assigned in one tract for the whole.¹ And in Iowa, while the doctrine is distinctly held, that where the widow is entitled to dower in different tracts, the courts possess no power to order the dower in all the tracts to be assigned out of one or more parcels without the consent of the dowress;² yet it is also settled, in accordance with the principles of the common law,³ that the form of the assignment may be controlled by the agreement of the parties.⁴ In New Hampshire⁵ and Tennessee,⁶ dower may be assigned in one or more parcels, as may be convenient. So in Rhode Island, where the different parcels belong to the same person.⁷ So in Ohio,⁸ Missouri⁹ and North Carolina,¹⁰ where the assignment can be made without prejudice to the rights of any person interested in the land. So in Kentucky, where the lands are not severally held by different devisees or purchasers.¹¹ In Georgia, where dower is to be assigned in two or more tracts in the same county, the commissioners are authorized, if in their judgment it will promote the interests of all parties, to assign the dower in one of the tracts; and the widow is permitted to select the tract in which the dower is to be laid off.¹²

Assignment in estates held in common.

21. As has been already stated,¹³ if the husband be tenant in common, and die before partition, the dower of his widow must be assigned to her to hold in common also, and not in severalty.¹⁴ But if partition be made before the husband's death, so as to invest him with a sole seizin in his share of the lands, the widow's dower is

¹ Coulter v. Holland, 2 Harring. 330. Otherwise, where there are several devisees or purchasers. Ibid.

² O'Ferrall v. Simplot, 4 Iowa, 381.

³ Ante, ch. iv., §§ 22-35.

⁴ Corriell v. Bronson, 6 Clarke (Iowa), 471.

⁵ N. H. Comp. Stat. 1853, p. 420, § 3. See, also, p. 424, § 1.

⁶ Code Tenn. 1858, § 2403.

⁷ Rev. Stat. R. I. 1857, p. 503, § 3.

⁸ 1 Rev. Stat. Ohio, p. 520, § 11; Ibid., p. 898.

⁹ 1 Rev. Stat. Misso. 1855, p. 674, § 29. ¹⁰ Rev. Code N. C. 1855, p. 602, § 3.

¹¹ 2 Rev. Stat. Ky. by Stanton, p. 27, § 12.

¹² Cobb's New Dig., p. 230, § 1; p. 231, § 1. ¹³ Ante, ch. iv., § 16.

¹⁴ Fitzh. N. B. 149 (I); 1 Brownl. 127; Litt. § 44; 2 Raym. 785; Perk. § 412; Park, Dow. 251; Rank v. Hanna, 6 Ind. 20; Lloyd v. Conover, 1 Dutch. 47; Woodhull v. Longstreet, 3 Harr. 405.

thereby rendered capable of being assigned in severalty; and in such case, the assignment of it ought to be made by metes and bounds.¹ So the widow of a tenant in common whose interest was conveyed in his lifetime, without release of dower, to his co-tenant, may have her dower set out by metes and bounds.²

Assignment in leasehold estates.

22. By statute in several of the States, a widow may have dower of an estate for years.³ And it has been held, that the assignment of dower in such cases is governed by the same rules applicable where the endowment is in estates of inheritance.⁴

Assignment in mines.

23. Of open mines and minerals, the following distinctions have been laid down in a late English case,⁵ in regard to the manner of assigning dower: If the open mines be within lands which belonged to the husband, the sheriff must estimate the annual value of them, as part of the value of the lands of which the widow is dowable; but he need not assign to her any of the mines, or any parts of them; he may include a third of their annual value in the quantity of the lands set out by him by metes and bounds for dower in which are none of the mines or minerals. But if he choose, as he is at liberty to do, to include any of the mines or minerals in the assignment, then if the lands in which they are, form no part of the lands assigned for dower, he ought to describe the mines specifically; if, however, the mines assigned be included in the lands set out in dower, it is optional in him to particularize them, since they are parts of the lands assigned. But the sheriff is not compellable to adopt either of these methods. He may divide the enjoyment and perception of the profits of the mines between the parties, viz., by

¹ Perk. § 412; 1 Roper, H. & W. 396; vol. i., ch. xvi., §§ 13-17; Potter v. Wheeler, 13 Mass. 504; Wilkinson v. Parish, 3 Paige, 653; Totten v. Stuyvesant, 3 Edw. Ch. 500; Dolf v. Basset, 15 John. 21; Jackson v. Edwards, 22 Wend. 498; Mosher v. Mosher, 32 Maine, 412; Ridgeway v. Newbold, 1 Harring. 385.

² Blossom v. Blossom, 9 Allen, 254.

³ Gen. Stat. Mass., p. 471, §§ 20, 22; 1 Rev. Stat. Misso., p. 668, § 1; Comp. Laws Kansas, p. 478, § 1; 1 Rev. Stat. Ohio, p. 516, § 1; ante, vol. i., ch. xvii., §§ 12-18.

⁴ Rankin v. Oliphant, 9 Misso. 239.

⁵ Stoughton v. Leigh, 1 Taunt. 402. See observations of Mr. Park on this case, quoted ante, vol. i., ch. x., § 6.

directing the separate alternate enjoyment of the whole for short periods, proportioned to the share each party had in the subject, or by giving to the widow an adequate part of the profits.¹

24. With respect to open mines or minerals of the husband lying in the lands of other persons, and in which his widow is entitled to dower, it is to be observed, that if the assignments for dower of such mines could be made by metes and bounds, in the manner lands are required to be divided, that method ought to be adopted; but since that can not be accomplished without preventing the parties from having the proper enjoyment and perception of the profits, the sheriff is permitted to assign dower in a special manner. It is not, therefore, necessary that the sheriff should divide each of the mines; but he may assign such a number of them as he thinks proper, so as to give each person a due share of the whole, as before mentioned.²

25. In commenting upon the ruling in *Stoughton v. Leigh*, that the sheriff must estimate the annual value of the open mines as part of the value of the estates of which the widow is dowable, Mr. Park says:³ “No authority was referred to for this opinion, and it may perhaps be considered as encountered by a passage in Chief Baron Gilbert’s Tract on Dower, which was not adverted to in the argument. The passage is as follows: ‘If the wife, after the assignment of dower, do improve the land and make it better than it was at the time of the assignment, an admeasurement does not lie of that improvement. 14 Hen. III., Admeasurement, 10; 13 Edw. I., Ibid. 17. But if the improvement be by casualty, as a mine of coals, or of lead, which are in the land, &c., which have been occupied in the husband’s time, the doubt is the more; but she shall not dig new mines, for that would be waste. The distinction touching the mine seems to be this, that where a mine is not open, she can not work it at all, because it will be waste; if it be open and in work, it seems to be only a *casual profit*; and a casual profit shall not avoid an assignment, or be so admeasured as to vacate it, since it is not certain to continue during the life of the dowress; and therefore *not to be computed into the value of that part which she possesses*, unless the value was co-extensive [in point of duration] with the estate which she is to have in it.’ ”⁴

¹ 1 Roper, H. & W. 397.

² *Stoughton v. Leigh*, 1 Taunt. 402; 1 Roper, H. & W. 397; Park, Dow. 253.

³ Park, Dow. 258-261.

⁴ Gilb. Dow. 390.

26. "In *Hoby v. Hoby*,¹ (1683)," the author proceeds, "the subject seems to have been viewed in much the same light as it was in the later case of *Stoughton v. Leigh*. In that case, the tenant came into equity to be relieved against an assignment of dower by the sheriff, charging fraud and collusion, and that there had been assigned to the defendant for her dower, one full third part of the lands which amounted to 300*l.* per annum; and that in this third part there was a coal work, which one year with another was worth 300*l.* per annum beyond all charges, and yet no consideration was had of it in the assignment of dower. It appears from the register's book, that the court proposed to the parties that the defendant should either take 300*l.* per annum, the sum originally proposed to be settled on her by articles before marriage, or that she should work all the coal pits, and dig coals, as well on the plaintiff's land as the land assigned the defendant in dower, and to take a third penny thereof, or else a new writ of seizin on the judgment in dower should be issued to the sheriff, to divide the land into three parts, and to choose by lot; the defendant thereupon consented to accept a third penny of the clear profits of the said estate, provided she might have it allotted to her out of the lands and coal works already allotted her in dower, which not being opposed on the part of the plaintiff, was so decreed, and the defendant was to be at liberty to break or make any new mouths to the said coal pits, in any part of the plaintiff's lands, not assigned; or any part of the lands assigned her in dower, and to work the same as she should think fit, and should at any time sink pits, work, dig, and carry away coals in and from any part of the plaintiff's lands, not assigned in dower, as well as in what lands are assigned, the defendant in dower allowing and accounting to plaintiff two third parts of the clear profits, and the defendant was to have an allowance of 40*l.* per annum out of the plaintiff's two-thirds of the profits to repair the mansion-house."²

27. "What weight would have been allowed to the proposition of Gilbert, in the particular case of mines, if that authority had been adduced to the court in *Hoby v. Hoby* and *Stoughton v. Leigh*, it is not for the author to determine; but from the language of the certificate in the latter case, it may be gleaned as the impression of the court, that in assigning dower by the sheriff, the

¹ *Hoby v. Hoby*, 1 Vern. 218; 2 Ch. Ca. 160.

² Reg. Lib. 1683, A. f. 256.

one-third of the widow is to be ascertained by reference to a general estimate of the annual value.¹ The purposes of substantial justice may probably be better consulted by the adoption of this principle than by a strict adherence to the old rule requiring the sheriff to assign a third part of each denomination of property; but as the authorities on this head were not brought before the court in *Stoughton v. Leigh*, that case can hardly be considered as overruling the more ancient decisions, particularly as the judges expressed themselves as declaring their impressions of what the existing law was, rather than as promulgating any new exposition thereof."²

28. In New York, in the case of *Coates v. Cheever*,³ the rule laid down in *Stoughton v. Leigh* was substantially adopted by the court. It was there held, that dower may be assigned of mines, either collectively with other lands, or separately of themselves; that it should be assigned by metes and bounds, if practicable; if not, that a proportion of the profits, or the separate alternate enjoyment of the whole for short proportionate periods, should be allotted to the widow. "The admeasurers," said Woodworth, J., "should take into consideration the value of the mine as far as it was opened during the husband's life, and then assign the dower, either by measuring off one-third in value, or specifically assigning a reasonable share of the profits at short periods. The case of *Stoughton v. Leigh* contains the rules by which I think the admeasurers ought to be guided." And Savage, C. J., added: "If practicable, they should have given her a proportion of the ore-bed, assigning to the tenant his own improvements. If such a division was impracticable, then they should have directed an alternate occupancy of the whole, or a share of the profits."⁴

Alternate enjoyment.

29. The circumstances under which the separate alternate enjoyment of mines may be directed, in assigning dower, have been pointed out in the preceding division of this chapter. The same

¹ See post, §§ 37-40.

² Park, Dow. 258-261.

³ *Coates v. Cheever*, 1 Cow. 460.

⁴ See, also, *Billings v. Taylor*, 10 Pick. 460; *Moore v. Rollins*, 45 Maine, 493; vol. i., ch. x., §§ 4-10. It is held in New Jersey, that dower may be assigned in clay banks. *Rockwell v. Morgan*, 2 Beasl. Ch. 384, 389.

mode of assignment is sometimes adopted with respect to a mill. By the common law, the widow can not be endowed of that description of property by metes and bounds. If she recover judgment in a writ of dower of a third part of a mill, it will be erroneous, and may be reversed on a writ of error.¹ The proper assignment of dower in this case is, as has been before stated,² either of the third toll dish, or of a third of the profits, or of the entire mill for every third month.³ A separate alternate enjoyment may be also allotted in assigning dower in a ferry.⁴

Improvements by the heir.

30. It seems to be settled, that if the heir, after the husband's death, improve the estate, and its value is thereby enhanced, the widow will be entitled to her dower of the lands so improved, without any allowance to the heir on account of his expenditures or labor.⁵

31. But the old books are not entirely agreed upon the proposition above stated, and a distinction appears to have been taken in regard to the character of the improvements made. Thus, it is said, "if a woman is entitled to have dower of a *marsh*, and the heir, by his industry makes it good meadow, she shall recover and have dower as it now is, because the title is to the quantity of the land, and not to the value; but if the heir hath improved it by building, or any collateral improvement, it is otherwise."⁶ But

¹ *Gilpin v. Cookson*, 1 Lev. 182.

² Ante, ch. iv., § 17.

³ *Perk.* §§ 342, 415; *Co. Litt.* 32 a.; *Gilb. Dow.* 397; 1 *Roper, H. & W.* 396; *Park, Dow.* 252; *Gen. Stat. Mass.*, p. 697, § 8; p. 469, § 5; *Rev. Stat. Maine*, 1857, p. 607, § 26; 2 *Comp. Laws Mich.*, p. 852, § 11; *Rev. Stat. Wis.* 1858, p. 547, § 11; *Stat. Minn.* 1858, p. 408, § 11; *Stat. Oregon*, 1855, p. 406, § 11. See *Hyzer v. Stoker*, 3 B. Mon. 117, where it is held, that if the property be indivisible, the widow may, at her election, enjoy it every third year, or receive one-third of the future rents. In *Smith v. Smith*, 5 Dana, 179, it was determined, that where there is a mill and other improvements upon the same land, it is not the indispensable duty of the commissioners to assign to the widow the third toll dish, or whole mill every third month, third six months, or third year, as would be the case in an estate which is indivisible, as in a mill only.

⁴ *Stevens v. Stevens*, 3 Dana, 371.

⁵ 1 *Roper, H. & W.* 349; *Park, Dow.* 257; 4 *Kent*, 65; 1 *Washb. R. P.*, 2d ed., 236, pl. 22; *Co. Litt.* 32 a.; *Hargr. note* 8, *Ibid.*; *Humphrey v. Phinney*, 2 *John.* 484; *Hale v. James*, 6 *John. Ch.* 260; *Catlin v. Ware*, 9 *Mass.* 218; *Larrowe v. Beam*, 10 *Ohio*, 498; *Thompson v. Morrow*, 5 *Serg. & R.* 289, 290; *Powell v. Mon. & Brimf. Man. Co.*, 3 *Mason*, 347, 365, 369; *McClanahan v. Porter*, 10 *Misso.* 746.

⁶ 13 *Hen. III.*, *Dower*, 292; *Plow. Qu.* 46. See *Park, Dow.* 257.

Lord Coke lays down the rule without this qualification. He says:¹ "If the wife be entitled to have dower of three acres of marsh, every one of the value of twelve pence, [and] the heir by his industry and charge maketh it good meadow, every acre of the value of ten shillings, the wife shall have her dower according to the improved value, and not according to the value as it was in her husband's time; for her title is to the quantity of the land, viz., one just third part. *And the like law it is if the heir improve the value of the land by building.*" The learned author quotes no authority for this position except a case in 30 Edw. I., obscurely reported in Fitzherbert's Abridgment, title Voucher, 298, which, on examination, does not seem to fully meet the point.² But as Mr. Park justly observes,³ "it is probably difficult to find any satisfactory reason for the distinction. A house erected upon another man's land, becomes attached to, and parcel of the freehold, and ensues the title of the land; and if it shall go with the land to the person *absolutely* entitled thereto, it is not easy to understand why it shall not also become subject to particular interests in the land;" and as has been stated, the modern authorities, both English and American, are in accordance with this view.⁴

32. It has been said, in some modern cases, that the reason why, when the heir builds upon, or otherwise improves the estate, the widow shall have her dower of the improvements, is because it is his folly to make the improvements before assigning dower.⁵ But Mr. Justice Story dissents from this view.⁶ "This may be the true reason," he remarks, "but neither my Lord Coke, nor, as far as I can trace, do any of the old authorities assign this as the ground of the rule. And if it be, how does it happen that if the heir impairs the value, still her dower is only of the value at the time of the assignment, thus permitting him to derive benefit from his

¹ Co. Litt. 32 a.

² See opinion of Story, J., in *Powell v. Mon. & Brimf. Man. Co.*, 3 Mason, 347, 365-6; and statement of the case, post, ch. xxii., § 7.

³ Park, Dow. 257.

⁴ See citations in note to preceding section. In *Manning v. Laboree*, 33 Maine, 343, 347, the court appear to have overlooked the distinction taken in regard to the rights of the widow where improvements have been made by the heir and where they have been made by an alienee of the husband.

⁵ *Thompson v. Morrow*, 5 Serg. & R. 289, 290; *Catlin v. Ware*, 9 Mass. 218, 221; *Hale v. James*, 6 John. Ch. 258, 260. See 4 Kent, 65; 1 Washb. R. P., 2d ed., p. 236, pl. 22; 1 Roper, H. & W. 349.

⁶ In *Powell v. Mon. & Brimf. Man. Co.*, 3 Mason, 347, 367.

folly or his wrong.¹ If I were allowed to hazard a conjecture, it would be, that the rule proceeded upon grounds somewhat more artificial and technical. In case of a disseizin, if the disseizor build upon the land which he hath by disseizin, and the disseizee afterwards enter, the latter shall have the buildings as well as the land. The reason is, that the title and seizin of the soil, upon recovery by the common law, carry everything annexed to the freehold as an incident. . . . The tenant in dower, therefore, like any other tenant of the freehold, takes upon a recovery whatever is then annexed to the freehold, whether it be so by folly, by mistake, or by the purest innocence. If a recovery be upon a title paramount against any person, though he may be a *bonâ fide* purchaser, and have made improvements on the land, yet the common law gives the demandant a perfect title to all the improvements, as well as to the land. And if, in the hands of such a purchaser, the lands are deteriorated, still the recovery is confined to the land, in its actual state at the time of the recovery;² for at the common law no damages were given in real actions. It is true that, in the case of the heir, he is in by descent; and so his possession being cast upon him by the law, may seem rightful; but when the wife is endowed upon a recovery from the heir and assignment of dower, she is in from the death of her husband, and the heir's possession is avoided, and by consequence, there is no right of possession as to this third part acquired to the heir, since the law doth not place him in such third part after the death of the father. The rule, therefore, that subjected the improvements as well as the land in the possession of the heir to the claim of dower, seems a natural result of the general principles of the common law, which gave the improvements to the owner of the soil."

33. The rule above considered is not limited to improvements made by the heir. If lands which have been sown by him be assigned to the widow for her dower, she will be entitled to the crops.³

34. In some of the States, the rule of the common law giving the widow the benefit of improvements made by the heir, has been changed by statute. In New York, an enactment passed in 1806, excluded improvements made on wild land;⁴ and by the revised

¹ Post, § 35.

² Post, ch. xxii., §§ 46-49.

³ Dyer, 316 a., pl. 2; Perk. § 521; 2 Inst. 81; Parker v. Parker, 17 Pick. 236; Ralston v. Ralston, 3 G. Greene (Iowa), 533; ante, ch. iv., § 36; post, ch. xxx., §§ 15-20.

⁴ See Walker v. Schuyler, 10 Wend. 484.

statutes the heir is protected as to improvements made on any of the lands of the husband.¹ In Kentucky, whether the recovery is against the heir, or devisee, or purchaser from the husband, the wife shall be endowed according to the value of the estate when received by the heir, devisee, or purchaser, so as not to include in the estimated value any permanent improvements he has made on the land.² In Ohio, the commissioners appointed to assign dower, in appraising the yearly value of the estate, are required to exclude all permanent or valuable improvements made thereon after the husband ceased to be the owner.³ In New Hampshire, the widow is to be endowed of so much of the estate as will produce a yearly income equal to one-third of the yearly income thereof at the time the husband died or parted with his title.⁴

Depreciation in value after the husband's death.

35. Inasmuch as the widow is entitled to the advantage of the improvements made by the heir, it is but just that she should bear a proportion of the loss which may be incurred in an unavoidable diminution in the value of the lands during the time which intervenes between the death of her husband and the assignment of her dower. "If," says Lord Coke, "the value be impaired in the time of the heir, she shall be endowed according to the value at the time of the assignment, and not according to the value as it was in the time of her husband."⁵ She can claim nothing from the heir, therefore, by reason of the deterioration of the estate, unless it were occasioned by his own voluntary misconduct, as by committing waste. In that case she would be entitled to a compensation in damages.⁶

36. But where buildings subject to dower had been insured, and

¹ 2 N. Y. Rev. Stat., p. 490, § 13. ² 2 Ky. Rev. Stat. by Stanton, p. 27, § 10.

³ 1 Rev. Stat. Ohio, p. 522, § 19.

⁴ N. H. Comp. Stat. 1853, p. 420, § 3; p. 521, § 5.

⁵ Co. Litt. 32 a. See post, ch. xxii., §§ 46-49.

⁶ Co. Litt. 32 a.; 1 Roper, H. & W. 349; Park; Dow. 258. See *Powell v. Mon. & Brimf. Man. Co.*, 3 Mason, 347, 368; *Campbell v. Murphy*, 2 Jones, Eq. 357, 362; *Hale v. James*, 6 John. Ch. 258, 260. In 14 Hen. IV., 33, it is made a query if the heir decay the land, tenements, or houses, if the wife shall be endowed in the land according to the value when it was in the possession of her husband, or shall have the third part as it is, and have allowance for the improving. See, also, Plowden, Query 46. Park, Dow. 258, note.

after the death of the husband they were destroyed by fire, it was held, that the widow was entitled to a share of the insurance money, to be estimated according to the proportion of her interest in the estate.¹

Mode of ascertaining the proportion of the widow.

37. It is difficult to gather from the old books, any distinct proposition as to the mode in which the proportion of the widow is to be estimated and ascertained in setting out her dower. It is obvious, that if regard were to be had to the *quantity* alone, a mere illusory assignment might be made, by setting out a tract of land of little or no annual value; and in modern times, the relative value even of adjacent property, is often enormously disproportionate, in consequence of buildings and numberless other circumstances. That an assignment of one-third in productive value, and not in point of quantity merely, was what was contemplated by the old law, admits of no doubt; but in the simple state of property in former times, it is probable that the only provision that was made for the security of the dowress was, by requiring that the sheriff should assign to her a third part of each existing denomination of property. Thus, he was bound to assign to her a third part of each manor, if there were several; or a third part of the arable, a third part of the meadow, and a third part of the pasture.² In assignments by the heir, it was a matter of arrangement between him and the widow, what particular portion of the property should be set out, and if they could not agree, she resorted to her suit.³

38. This subject has undergone consideration in several cases contained in the American reports. In New York, in the Matter of Watkins,⁴ the court, in speaking of admeasurers of dower, remarked that "they are in the nature of commissioners, to set off the *one-third in value* of the estate, so as to prevent all difficulty and contention between the widow and the heir or tenant, as to the just extent or ascertainment of her dower." In Massachusetts, in

¹ Campbell v. Murphy, 2 Jones, Eq. 357.

² 1 Roll. Abr. 683. See, however, 12 Edw. IV. 2; Bro. Dow. 72, *contra*. And see ante, §§ 17-20.

³ Park, Dow. 255; 1 Washb. R. P., 2d ed., 236.

⁴ In the Matter of Watkins, 9 John. 245. See, also, Coates v. Cheever, 1 Cow. 460, 476.

the case of *Leonard v. Leonard*,¹ the court laid down the following as the proper rule to be observed: "In the assignment of dower, commissioners are to regard the rents and profits only, of the several parcels of the estate out of which dower is to be assigned. When they have ascertained the annual income of the whole estate, they ought to set off to the widow such a part as will yield her one-third of such income, in parcels best calculated for the convenience of herself and of the heirs. This rule is adapted equally to protect widows from having an unproductive part of estates assigned to them, and to guard heirs from being left, during the life of the widow, without the means of support." And this doctrine was reaffirmed in the subsequent case of *Conner v. Shepherd*.² "It is well understood by the common law," the court there said, "and the principle has been repeatedly settled in this court, that the dower of the widow is not to be assigned so as to give her one-third of the land in quantity, but so that she may enjoy one-third of the rents and profits, or income of the estate." In Maine, the rule has been stated in substantially the same language. "The widow is entitled to have such part of the land set out to her as dower, as will produce an income equal to one-third part of the income which the whole estate would produce, if no improvements had been made upon it since it was conveyed by the husband."³

39. In Kentucky, in the case of *Taylor v. Lusk*,⁴ the widow moved to set aside the assignment of dower on the ground that she was excluded from the mansion-house. The court said: "We perceive no sufficient reason for quashing the report because the mansion-house was not allotted to the widow. If she obtained an equal third part in the value of the land, it is all the law gives, and she can not complain, no matter where it is laid off to her. The law gives her no preference over the heirs or devisees."⁵ In *Smith v. Smith*,⁶ it was held, that "in assigning dower, regard should be had to the productiveness, as well as to the value of the different parcels of the estate; and the allotment should include such as will yield the widow a fair share of the annual income of the whole. To allow her unproductive property only, as wild lands, a house without

¹ *Leonard v. Leonard*, 4 Mass. 533.

² *Conner v. Shepherd*, 15 Mass. 164, 167.

³ *Carter v. Parker*, 28 Maine, 509.

⁴ *Taylor v. Lusk*, 7 J. J. Marsh. 636.

⁵ In some of the States the widow is entitled by statute, to have the homestead or dwelling-house, included in the assignment. See ante, §§ 8, 9.

⁶ *Smith v. Smith*, 5 Dana, 179.

fields, &c., though it may be one-third of the value, is neither just nor legal."¹ The same principle has been applied in North Carolina.² In a case³ in Iowa, it was adjudged that "the word 'value' in section 1294 of the code, in relation to dower, was intended to provide for the assignment of dower according to the worth or value of the real estate, instead of the extent or quantity thereof."

40. The case of *Gibson v. Marshall*,⁴ determined in South Carolina, was a bill by the widow in occupation of the premises, against a purchaser after the death of her husband, with notice of her claim, for an assignment of dower in a lot in the city of Charleston. The commissioners certified that the lot could "be fairly and justly divided, having regard to the true and fair value" thereof; and that they had assigned to the demandant the houses and most of the highland, leaving to the defendant a much larger portion of market value, equivalent to her interest, but yielding no rent. The report was nevertheless confirmed.⁵

¹ See, also, *Stevens v. Stevens*, 3 Dana, 371; *Lawson v. Morton*, 6 Dana, 471.

² *McDaniel b. McDaniel*, 3 Ired. L. 61. See *Stiner v. Cawthorne*, 4 Dev. & B. L. 501.

³ *Corriell v. Bronson*, 6 Clarke (Iowa), 471.

⁴ *Gibson v. Marshall*, 6 Rich. Eq. 210.

⁵ See, also, 1 Stat. III. 1858, p. 155, § 25; N. H. Comp. Stat. 1853, p. 420, § 3; p. 521, § 5; Cobb's New Dig. Stat. Geo. p. 229, § 1.

CHAPTER XXII.

ASSIGNMENT OF DOWER BY METES AND BOUNDS AS AGAINST AN ALIENEE OF THE HUSBAND.

§ 1. Introductory.	28-34. Mode of enforcing a claim for improvements.
2-4. Assignment where there are several alienees.	35-45. Increase in value from extrinsic causes.
5-17. The rule in England as to improvements by the alienee.	46-49. Deterioration in the hands of the alienee.
18-26. The rule in the United States as to improvements by the alienee.	50-52. Exoneration of the estate conveyed where the husband dies seized of other lands.
27. Date of the alienation.	

Introductory.

1. IN many respects the rules regulating the assignment of dower as against the heir,¹ are applicable to proceedings against a purchaser from the husband. But in some particulars the rights of the alienee differ from those of the heir; and we will now proceed to consider the nature and extent of that difference.

Assignment where there are several alienees.

2. Where the husband dies seized of several distinct tracts or parcels of land, the common law requires, as we have seen,² that dower shall be assigned in each separate tract.³ The same rule obtains where the husband has divided his lands into several parcels and aliened them to different purchasers;⁴ or where they have been so divided and conveyed by his alienee.⁵ And it seems that the

¹ See the preceding chapter.

² Ante, ch. xxi., §§ 17-20.

³ But see observations of Mr. Jacob, quoted ante, ch. xxi., § 19.

⁴ Anon. Freem. 227; Co. Litt. 35 a.; Doe d. Riddell v. Gwinnell, 1 Q. B. (1 Adol. & Ellis, N. S.) 682; 41 Eng. C. L. 728; Park, Dow. 282; Ellicott v. Mosier, 11 Barb. 574; Coulter v. Holland, 2 Harring. 330; Thomas v. Hesse, 34 Misso. 13; Cook v. Fisk, Walker (Missis.), 423; Fosdick v. Gooding, 1 Greenl. 30. See 2 Rev. Stat. Ky. by Stanton, p. 27, § 12.

⁵ Doe d. Riddell v. Gwinnell, *supra*; Fosdick v. Gooding, 1 Greenl. 30; Thomas v. Hesse, 34 Misso. 13.

court will itself order that the sheriff charge all the purchasers proportionally, and thus preserve equality among them.¹

3. Where the widow, in her complaint, described lands in the possession of several tenants, occupying different portions, the defendant occupying but a small part, and claimed for her dower one-third of the whole, and obtained a verdict, it was held, that upon filing the record of judgment, commissioners should be appointed to make admeasurement of dower out of the lands only of which the widow was dowable found by the jury to be in the possession of the defendant.²

4. In a case³ in Delaware, the husband was seized in severalty of one tract of land, and of an undivided interest in another. He devised the parcel held in severalty to his two sons, and his interest in the other to his four daughters. Dower was assigned entirely in the tract devised to the sons, who made no objection. One of the sons was authorized to sell the premises devised to them, and to divide the proceeds with his brother. He made a sale, after the assignment of dower; and the purchaser subsequently applied to have the assignment set aside. But the court refused the application, chiefly upon the ground that the devisees had not objected to the assignment, and that the applicant was a purchaser with notice.

The rule in England as to improvements by the alienee.

5. The rule, as established in England, gives to the widow the benefit of all improvements made by the alienee of the husband subsequent to the time when the latter parted with his title. The principle there settled is, that dower attaches on the husband's real property at the period of his death, according to its then actual value, without regard to the hand which has brought it into the condition in which it is found. If the improvements have taken place between the time of the husband's death and the time of the assignment, it seems, according to the ruling of the English courts, that the value must be taken at the period of the assignment.⁴ But several of the ancient authorities are opposed to this doctrine, and in the United States an entirely different rule prevails.⁵

¹ Anon. Freem. 227; Park, Dow. 282.

² *Ellicott v. Mosier*, 11 Barb. 574.

³ *Coulter v. Holland*, 2 Harring. 330.

⁴ *Doe d. Riddell v. Gwinnell*, 1 Q. B. 682; 41 Eng. C. L. 728; 1 Gale & Dav. 180; 1 Bright, H. & W. 386; Park, Dow. 255-8.

⁵ Post, §§ 18-26.

6. In Perkins, we find the following exposition of the law upon this point:¹ "If a man be seized of land in fee, and take a wife, and enfeoff a stranger of the land, and the feoffee builds thereupon a castle or mansion-house, or other buildings, or otherwise improves it, so that it is worth more by the year than when it was in the possession of the husband; the wife shall not have her dower but according to the value it was of in the time of her husband." Mr. Hargrave seems to have entertained the same opinion, for he says:² "If feoffee improves by building, yet dower shall be as it was in the seizin of the husband;" and he quotes from the Hale MSS. the following reason for the rule: "For the heir is not bound to warrant, except according to the value as it was at the time of the feoffment, and so the wife would recover more against the feoffee than he would recover in value, which is not reasonable."³ This statement of the law appears to be supported by several cases cited from the old reports.

7. One of the cases referred to in Mr. Hargrave's note, is 17 Hen. III., cited in Fitzherbert's Abridgment,⁴ and is as follows: "E., who was the wife of R., demands one-third part of three acres of land with the appurtenances in E., as her dower, against W. And W. comes and says, that he bought the land of her husband, naked and unbuilt upon, and he built upon it; and he willingly allows to her her third part, saving the buildings to himself. And therefore she had her seizin, saving to the said W. the houses built by him, &c., because he had, without the buildings, where she might have her land, &c." Another case is 31 Edw. I., reported in the Year Book, in these words:⁵ "In a writ of dower the demand was for the third part of three acres and of a mill, &c., where the tenant vouched to warranty; and when the vouchee came, he put forward a charter which stated that he ought to warrant a piece of land, &c. *Herle*. The demand is for a mill, and the charter speaks of a piece [of land] only; judgment if to warrant, &c.—*The Tenant*. We have, since the gift, built a mill on that piece; judgment if he ought not to warrant, &c.—And the case was that the woman's husband was seized of the piece [of land] when it was not built on.—HENGHAM. If I enfeoff you of a vacant piece of land, and you

¹ Perk. § 328.

² Hargr. Co. Litt. 32 a., note 8.

³ Ibid.

⁴ Fitzh. Ab. tit. Dow. 192.

⁵ Year Books 30 & 31 Edw. I., by Horwood, p. 299. The same case is also briefly noticed in Fitzh. Ab. tit. Vouch. 288.

afterwards build a castle on it, ought I to warrant to you the castle? (as though intimating the negative.) But for all this you ought to have disclosed the circumstances when you vouched; therefore in respect of the mill let him be absolved, and let him warrant the remainder." A case¹ cited by Lord Coke to the point that as against the heir the widow is dowable according to the value of the lands at the time of the assignment,² seems also to have a bearing upon this question. The report, as given by Fitzherbert, is very short and obscure, but it appears to have been a case of dower, where the widow demanded a *place*, which, at the time her husband sold it, was without a dwelling-house; but she demanded dower of the one-third of the *messuage*, or of the value against the heir who was vouched. The case was put, if the husband sell a site, and afterwards the purchaser build a castle on it, whether she should have dower of the third part of the castle, and it was denied. And thereupon it is said, that by the award of the court she recover the third part of the place [*de la place*.]³ "These cases," remarks Mr. Justice Story,⁴ "seem, in substance, to support Lord Hale's position, and establish a distinction between the case of the heir and a purchaser in favor of the latter."⁵

8. But in the recent English case of *Doe d. Riddell v. Gwinnell*,⁶ the subject was fully considered, and a conclusion arrived at adverse to the right of the alienee to have his improvements excluded from the estimate of value, in making the assignment of dower. As the question possesses general interest, and is of great practical importance, it may not be unprofitable to present here so much of the opinion of the court as will explain the reasoning upon which they proceeded. "The third question," said Lord Denman, C. J., "is, whether the widow shall have a third part of the lands according to their value at the time when her husband aliened them, or at the time of his death, or at the time of the assignment. In the present case, the value at the time of the death, and at the time of the assignment, though some years elapsed between them, seems to have been the same. The question is between the value of lands at

¹ 30 Edw. I., reported in Fitzh. Ab. tit. Voucher, 298. I find no reference to this case in the Year Book 30 Edw. I., by Horwood.

² Co. Litt. 32 a.

³ Per Story, J., in *Powell v. Mon. & Brimf. Man. Co.* 3 Mason, 347, 365-6.

⁴ Ibid. 367.

⁵ See, also, 1 Roper, H. & W. 349, 350.

⁶ *Doe d. Riddell v. Gwinnell*, 1 Q. B. (1 Adol. & El. N. S.) 682; 41 Eng. C. L. 728; 1 Gale & Dav. 180.

the time of alienation and of the death of the husband. It appears that the lands have been greatly improved by buildings; but that one-third at least of the lands aliened by the husband remained not built on. That part, however, is not in the hands of the defendant; for though the husband aliened to one person, that person parcelled out the lands to several others. We are of opinion that, when the lands at the death of the husband are in the possession of several persons, whether by his, the husband's act, or the act of his alienee, dower must be assigned as to one-third of the lands in each person's possession; and, therefore, that the question above stated is raised in this case, notwithstanding the quantity of the land still remaining not built on.

9. "Very little is to be found in our books upon this question. What authorities are found are collected by Mr. Park in his valuable Treatise on the Law of Dower, p. 255, *et seq.* The principal authority is Perkins, sect. 328, (p. 65,) who lays it down, that 'if the feoffee builds thereupon a castle or mansion-house, or other buildings, or otherwise improves it so that it is worth more by the year than when it was in the possession of the husband, the wife shall not have her dower but according to the value it was of in the time of her husband. And yet if a disseizor build upon land which he hath by disseizin, and the disseizee enters, he shall have the building, &c. And so,' &c., 'the cause of the difference is apparent.' The very next section of Perkins, viz., 329, lays it down, that if the feoffee 'takes down the building, and the feoffor dies, his wife shall have dower according to the value of the land as it was at the time of the *death of her husband*; and hath not any remedy for the taking away of the building before the death of her husband, although the building was upon the same land and in the possession of her husband during the coverture; for a wife hath not right to have dower before the death of her husband; *tamen quære* of this case.' The two sections are certainly not very consistent. The wife's right to dower is doubtless not consummate until the death of her husband; and if that be a good reason why she must submit to the intermediate deterioration of the property, it is also a good reason why she should have advantage of the intermediate improvement of it. If the alienee be considered as in the place of the husband in regard to the land, and to have the same rights that he had, there can not be a doubt but that the time when the value is to be ascertained must be the death

of the husband; and if the alienee suffers, it is his own fault, for improving land on which he must have known that the wife's right would attach if she survived her husband. So the reason for the doctrine of the 328th section, given in a note (8) to Co. Litt. 32 a., from Lord Hale's MSS., applies equally to the 329th. 'For the heir is not bound to warrant except according to the value as it was at the time of the feoffment, and so the wife would recover more against the feoffee than he would recover in value, which is not reasonable.'

10. "Mr. Park (on Dower, p. 256), refers to the Book of Assizes (14 Ass. 12) as a judgment for the widow *salvis ædificiis*; and says, 'it is added with some inconsistency, *and no damages*, because the land was amended by building upon it.' On examination of the original authorities, it will appear that here some confusion has taken place, and two cases have been reported as one. For the former of them is not in the Book of Assizes, but in Fitzh. Gr. Abr. *Dower*, pl. 192.² To a writ of dower against W. he pleaded 'quod emit terram illam de viro suo nudam et inædificatam, et super ædificavit et libenter concedit ei tertiam partem suam salvis ei ædificiis. Et ideo ipsa habebat seisinam suam salvis eidem W. domibus suis ædificatis, &c., quod habet alibi extra ædificia ubi habere poterit terram, suam, &c.' But the latter part of the sentence, stated by Mr. Park, respecting damages, is in 14 Ass. 12, and is the case of a prior who recovered by default in an assize of novel disseizin. 'Et l'Assize dit, que a nul damage, &c., car la place est amende per edifier.' A decision wholly foreign to the present subject.

11. "Plowden's 46th *quære* is in these terms: 'A woman is entitled to have a dower of a marsh, the heir by his industry makes it good meadow, she recovers it and shall be endowed of the third part as it now is, because her title is to *the quantity* of the land, not the *value*; but if the heir *improves the land by building*, or the like *collateral improvements it shall be otherwise*.³ *Quære*, if the heir suffers the houses upon the land to decay, shall the wife be endowed of the land according to its value when it was in the possession of her husband, or shall she have the third part as it now is, and be allowed in damages for the impairing? And it seems that damages shall not be recouped in assize for the improvement of such marsh.' Then follows⁴ the passage from Co. Litt. 32 a., with the note from Hale's MSS. already referred to.

¹ Ante, § 6.

² Ante, § 7.

³ See ante, ch. xxi., §§ 30-34.

⁴ Park, Dow. 257, 258.

12. "All of these authorities, we think, admit of a general answer from considering the nature of dower, and the remedy provided for it by the law of England. The right unquestionably attaches on all the lands of which the husband was seized during the coverture; and as certainly attaches at the period of his death. If, indeed, the assignment of dower be postponed, the value must be taken at the period of the assignment. And as the sheriff, in case of any dispute, is the appointed judge for dividing the lands by metes and bounds, it is difficult to see how that duty can be performed at any other time.

13. "But we must examine the authorities more in detail. On that of Perkins, we have already pointed out its obvious inconsistency. We may add, that he supports his proposition by no authority, and shows his own doubt of its correctness by the *quære* which he subjoins. But his 328th section derives countenance from Hale's MSS., cited in Mr. Hargrave's note to Co. Litt. 32 a., note (8). The reason there stated can not, however, be a just one, if the wife is properly considered as an entire stranger to all dealings between her husband and his feoffee. It also appears to prove too much; for it would extend to all manner of improvements, as well as building. The case in Fitzh. Gr. Abr. *Dower*, pl. 192,¹ is open to two constructions; either that the law would compel the widow to accept her dower out of the uncovered land, when a sufficient portion was left in that state, or that, in the particular instance, an amicable arrangement was made, and the purchaser was therefore permitted to have the full benefit of his own improvements from a view of what was then considered expedient and equitable. The latter appears the more probable supposition; and considerations of that sort would probably at all times influence those whom the law trusted to make the assignment. The estimate of value, in awarding a part of the estate to the widow, could hardly fail to be perplexed by the existence of buildings on the land, whether erected of old time or since the husband's death. The widow was not to be endowed of a castle, if for the defence of the realm, because that seems to have been rather regarded as public than private property: nor was she to be endowed of the mansion-house, or capital messuage, if that was *caput baroniæ vel comitatûs*: the meaning of which words underwent much discussion in the Lady Gerrard's

¹ Ante, § 7.

case.¹ But, even if it were *caput baroniæ*, we have it laid down by as old an authority as Bracton (Lib. II., ch. 40, § 3, fo. 97 b.), that she must have her dower even of a house so denominated, if no other dwelling can be found for her, *ut habeat ubi caput reclinet*.² If, on the other hand, it is meant that the edifices raised by an alienee can never be assigned to the widow, she must then of necessity be endowed by means of a money payment, if the whole land happened to be built upon. This state of things, never thought of in ancient times, may commonly occur now. But how is the estimate to be made? If according to the present value, the alienee gains nothing by the rule; if according to any former value, when is it to be assumed? At the period of the alienation, or of the husband's possession before? And how will it be possible for such an inquiry to be brought to a satisfactory termination?

14. "Plowden's *quære*, and his own opinion upon it, as well as Lord Coke's, appear to be in the widow's favor; but it is introduced by a reason which would apply, and to her prejudice, in a case like the present. But then Lord Coke's authority is against him; and he founds himself on no other reason than that improvement by building is collateral to the land. But why collateral? It occupies and obliterates the land, making an assignment of it impossible, and destroying the very means of ascertaining its independent value. The effect of planting with timber, or sowing with corn, or indeed of improving by any expensive process, is much the same, except, perhaps, for this last circumstance; but we can not see any reason for calling them less collateral than building. These text writers, indeed, speak of the heir, not of an alienee; and it is truly observed, that an heir voluntarily lays out his money on that which he not merely knows to be subject to the rights of another, but which at the very time ought to have been assigned to and possessed by another. But the same observation, though in part only, applies to a purchaser, who must be presumed to know the title of his vendor, and the liabilities of the estate purchased.

15. "Perkins' distinction between a feoffee and a disseizor rests on no authority; nor do we see how the rights of the dowress are to be affected by it. She knows nothing of the title under which it is held; and indeed questions of the most difficult nature might

¹ Lady Gerrard's case, Skin. 592; s. c. Holt, 260; 1 Ld. Raym. 72; 1 Salk. 253; Comb. 352; 5 Mod. 64.

² See Bract. fo. 96 b.

arise, whether the party in possession is a wrongful disseizor, or a feoffee with good title. Must these be decided by the sheriff before she can enjoy the provision made for her by the law? The sheriff's duty in assigning dower may be extremely arduous if he is only to determine on a fair distribution according to the value of the property, varying as it may, through all the different portions of a large estate; but it would become impracticable if he had to examine into the evidence of alienation and the legal effect and consequences of it, or if he were bound to assign, not according to the state of things then existing, but with reference to matters as they may be shown to have existed in the lifetime of the husband, peradventure many years before.

16. "By these considerations we are led to conclude that dower attaches on the husband's real property at the period of his death, according to its then actual value, without regard to the hands which brought it into the condition in which it is found; the law apparently presuming that it will continue substantially the same up to the assignment. Mr. Park (on Dower, 257) informs us that the understanding of the profession is, 'that the wife shall be endowed of the land as she finds it at the time of her title of dower consummated.' We have permission from Sir Edward Sugden to state that he always considered the rule to be that the widow is entitled to have assigned to her, as her dower, so much in value as is equal to a third in value according to the condition of the estate at the time of her husband's death. This opinion, contradicted by no judicial authority, is an important evidence of the law on a subject very likely to be brought into court in hostile controversy, but almost always certain to be arranged by the advice of eminent conveyancers, regulated in some respects by domestic circumstances, but surely not without some reference to the general principles of law handed down through a succession of ages."

17. But the court did not restrict the widow to dower in improvements made anterior to the husband's death. The chief justice added: "Secondly, some of these buildings were erected long after the death of the husband, not even by the purchaser from him, but by various sub-purchasers. But this can not prevent Lord Coke's rule from applying; and the hardship is voluntarily incurred by those who ought to have informed themselves correctly of the title which they took."¹

¹ Doe d. Riddell v. Gwinnell, 1 Q. B. 682; 41 Eng. C. L. 735.

The rule in the United States as to improvements by an alienee.

18. In this country, as has been before observed, a different rule has been adopted from that established in the English courts. And some of our most distinguished jurists have maintained, that the American doctrine is not only founded in justice and sound policy, but is sanctioned by the ancient authorities of the common law.¹

19. The case of *Libbey v. Swett*,² decided in Massachusetts in 1804, is one of the earliest American cases in which it was adjudged that the widow is not dowable of improvements made by the alienee of the husband. Not long afterwards, in considering the questions presented in *Gore v. Brazier*,³ Parsons, C. J., remarked: "An effect originating in this feudal principle may be discovered in this State in the assignment of dower against a purchaser. When the husband aliens with warranty during the coverture, and after dies, his widow shall not be entitled to the benefits of the improvements made by the purchaser, because he could not recover their value in other lands against the heir on the warranty of the husband. This rule is now supported in this State on principles of public policy, that purchasers may not be discouraged from improving their lands." In *Perry v. Goodwin*,⁴ the point was yielded by the widow, and not determined by the court. In *Ayer v. Spring*,⁵ the following explicit declaration of the law was made: "We are all of opinion that the demandant is entitled to her dower in the premises only as they existed at the time when her husband was last seized, and that she is not dowable of the buildings erected, or other improvements made thereon by the tenant." And this ruling was followed in other cases determined in the same State.⁶

20. The same principle has long been settled in New York by an unvarying current of decisions.⁷ In the earliest of these,⁸ Kent,

¹ See 4 Kent, 65, 66.

² *Libbey v. Swett*, Story's Plead. 365, note; cited by Story, J., 3 Mason, 370, 372.

³ *Gore v. Brazier*, 3 Mass. 523, 544.

⁴ *Perry v. Goodwin*, 6 Mass. 498.

⁵ *Ayer v. Spring*, 9 Mass. 8; s. c. 10 Mass. 80, where the question was ruled against the tenant on a point of pleading. See post, § 28.

⁶ *Catlin v. Ware*, 9 Mass. 218; *Webb v. Townsend*, 1 Pick. 21; *Stearns v. Swift*, 8 Pick. 532; *Powell v. Mon. & Brimf. Man. Co.*, 3 Mason, 347.

⁷ *Humphrey v. Phinney*, 2 John. 484; *Dorchester v. Coventry*, 11 John. 510; *Shaw v. White*, 13 John. 179; *Dolf v. Bassett*, 15 John. 21; *Allan v. Smith*, 1 Cow. 180; s. c. 20 John. 477; *Coates v. Cheever*, 1 Cow. 460; *Walker v. Schuyler*, 10 Wend. 480; *Hale v. James*, 6 John. Ch. 258; *Van Gelder v. Post*, 2 Edw. Ch. 577; *Parks v. Hardey*, 4 Bradf. 15.

⁸ *Humphrey v. Phinney*, 2 John. 484, (1807).

Ch. J., bases his conclusion, in part, upon what he deems the doctrine of the common law. He says: "The widow is not entitled to dower according to the improved value of the land, in case of alienation by the husband. She must take her dower according to the value at the time of the alienation. This is the rule prescribed in such cases by the Act;¹ and the statute did not, in this respect, introduce a new rule, for such was the law as understood and declared in the most ancient decisions of which we have any report."² Similar language was employed by the same judge in disposing of the case of *Hale v. James*,³ where, after stating the point determined in *Humphrey v. Phinney*, he added: "This was the old doctrine of the common law, and the case in 17 H. III. is cited in Fitzh. Ab. tit. Dower, s. 192, for the rule, that the wife shall have her dower without the improvements made by the purchaser from the husband. So in *Perkins*, tit. Dower, s. 328, referring to the same place in Fitzherbert, it is stated, that if the husband enfeoff a stranger, who improves and makes the land more valuable by the year, the wife shall not have her dower, 'but according to the value it was in the time of the husband.' Again, the rule is stated by Sir Matthew Hale to be, that the heir is not bound to warrant, except according to the value as it was 'at the time of the feoffment;' and the wife can not recover against the feoffee more than he could recover in value against the heir."⁴ These old authorities refer to the time of the alienation by the husband for the true period at which to estimate the value. There can be no doubt of the meaning of these cases; and if the land has subsequently by improvements increased in value, the wife can not recover against the feoffee more than the value at the time of the feoffment, or at the time of the husband, because the feoffee can not recover on his warranty more by way of indemnity against the heir. The rule is founded in sound policy, and does not discourage the purchaser from making improvements."⁵

21. How far this question is affected in New York by local legislation, is explained by Savage, C. J., in the case of *Walker v. Schuyler*.⁶ "The language of the revised statutes"—to quote from

¹ Sess. 29, ch. 168; 4 Laws N. Y., p. 616.

² He cites 17 Hen. III., Dower, 195; 31 Edw. I., Voucher, 288; *Perkins*, § 328; *Hargr. Co. Litt.* 32 a., note 8. See these authorities referred to, ante, §§ 6, 7.

³ *Hale v. James*, 6 John. Ch. 258.

⁴ *Hale's MSS.*, cited *Hargr. Co. Litt.* 32 a., note 8.

⁵ See post, §§ 41, 49.

⁶ *Walker v. Schuyler*, 10 Wend. 480.

his opinion—"is as follows: 'A widow shall be endowed of the third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage.'¹ The Act of 1787 was in nearly the same language. After declaring that the widow shall give nothing for her dower, that she shall tarry forty days in the mansion-house of her husband, &c., it is enacted as follows: 'And for her dower shall be assigned unto her the third part of all the lands of her husband, which were his at any time during the coverture.'² The statute of 1806 declares, that 'dower of any lands sold by the husband shall be according to the value of the lands, exclusive of the improvements made since the sale,'³ and points out a mode in which either the widow or the heirs, or other owners, may proceed to have dower admeasured and assigned by persons to be appointed by the surrogate; and directs, 'where any testator or intestate shall have been possessed of lands wild and unproductive, it shall and may be lawful for the admeasurers to take into view any improvements made upon any wild lands by any such heirs, or other proprietors or owners, and award the said improvements within the bounds of that part of the estate which shall be allotted to such heirs or other owners.' The revised statutes also provide that a widow may tarry in her husband's house forty days after his death, free of rent, and have her sustenance, whether her dower is assigned to her or not;⁴ and in making admeasurement, the commissioners appointed for that purpose shall take into view any permanent improvements made upon the lands out of which dower is to be assigned, since the death of, or alienation by the husband; and they are directed to allot such improvements to the heir or owner, if practicable; and if not, then to make a deduction from the widow's part, proportionate to the benefit she will derive from such improvements.⁵ So, also, where damages are recovered, they shall not be estimated for any permanent improvements made by the owner, whether heir or grantee of the husband.⁶ From this examination and comparison of the old and new statutes, it will appear that the rights of the widow are not altered as to the extent of her dower. The third part of the lands of the husband means one-third part of the value of the lands when the title passed from the husband. In case of alienation by the husband in his lifetime, the point has been settled by several

¹ 2 R. S. 740, § 1.² 1 R. L. 56, § 1.³ 1 R. L. 60, § 1.⁴ 1 R. S. 742, § 17.⁵ 2 R. S. 490, § 13.⁶ 1 R. S. 743, § 21.

adjudications. In the case of *Humphrey v. Phinney*,¹ the action was dower, and the defendant pleaded alienation by the husband in his lifetime, valuable improvements by the defendant, and readiness to set off one-third in value, as at the time of the conveyance. On demurrer to this plea, the court held that the principle assumed by the plea was correct; that the widow was not entitled to dower according to the improved value of the land, in case of alienation by the husband, but according to the value at the time of alienation. This decision was made in 1807, and the court took occasion to say, that the Act of 1806, did not, in that respect establish a new rule, and they refer to the Year Books for the same rule."

22. In Pennsylvania, also, it has been authoritatively determined that the widow shall take no benefit from the improvements of the purchaser. In *Thompson v. Morrow*,² Tilghman, C. J., after stating that at common law, the widow, where the husband died seized takes her dower according to the condition of the lands at the time of the assignment, proceeds as follows: "The law is different, however, when the husband aliens the land during coverture, for there the wife shall derive no advantage from any improvement made by the alienee. There is no injustice in this, for, if the husband had never aliened, he might not have made these improvements. And it would affect the prosperity of the country, by discouraging improvements in building and agriculture, if the wife were to be endowed of one-third of the value, including these improvements. This, I take to have been the main reason for excluding the wife from any part of the value arising from improvements; although we find in the old books another reason assigned, that is to say, that as the tenant in dower, who vouches the heir on a warranty of his ancestor, must recover of the heir, according to the value of the land, at the time of the alienation, it would be unreasonable that the widow should recover of the tenant according to any other value. So far as concerns improvements made by the alienee, it is agreed that the tenant shall be protected from this hardship. . . . There are not many authorities on this subject to be found in the English books, and such as we have are bottomed on decisions said to be reported in the Year Books. Mr. Hargrave, in his note on Co. Litt. 32 a., sect. 36, cites 1 H. V. 11; 17 E. III.; 17 H. III., Dower, 192; 31 Ed. I., Vouch. 288. 'If the feoffee

¹ *Humphrey v. Phinney*, 2 John. 484.

² *Thompson v. Morrow*, 5 Serg. & R. 289.

improve by buildings, yet dower shall be as it was in the seizin of the husband, for the heir is not bound to warrant except according to the value as it was at the time of the feoffment; and so the wife would recover more against the feoffee, than he would recover in value, which is not reasonable.' It is to be remarked, that the *decision* in the cases here cited, was upon improvements by buildings, erected by the feoffees; the decision, therefore, was clearly right, although a better reason might, perhaps, be given, than that which is said to be assigned for it in the Year Books. In Jenk. Cent. pa. 34, 35, case 68, in which the Year Book 47 E. III., 22, is cited, we have the law laid down as follows: "On voucher, if special matter be showed by the vouchee, viz.: that the land at the time of the feoffment was worth only 100*l.*, and now at the time of the voucher, is worth 200*l.* by the industry of the feoffee, the tenant shall recover only the value as it was at the time of sale, for, if the act of the feoffee has meliorated the land, this shall not prejudice the feoffor in his warranty.' Here is satisfactory reasoning indeed. The warrantee shall not by any *acts of his own*, increase the responsibility of the warrantor, for that would, in effect, be to alter the contract of warranty." To the same effect are the cases cited below.¹

23. The same doctrine prevails in Maine,² Ohio,³ Indiana,⁴ Kentucky,⁵ Illinois,⁶ Missouri,⁷ Tennessee,⁸ North Carolina,⁹ Mississippi,¹⁰ Alabama,¹¹ New Jersey,¹² Maryland,¹³ Delaware,¹⁴ South Caro-

¹ *Winder v. Little*, 1 Yeates, 152; *Leggett v. Steele*, 4 Wash. C. C. 305; *Benner v. Evans*, 3 Penn. 456; *Shirtz v. Shirtz*, 5 Watts, 255.

² *Mosher v. Mosher*, 15 Maine, 371; *Hobbs v. Harvey*, 16 Maine, 80; *Carter v. Parker*, 28 Maine, 509; *Manning v. Laboree*, 33 Maine, 343.

³ *Dunseth v. Bk. U. S.*, 6 Ohio, 76; *Allen v. McCoy*, 8 Ohio, 418. See *Larrowe v. Beam*, 10 Ohio, 498.

⁴ *Wilson v. Oatman*, 2 Blackf. 223; *Smith v. Addleman*, 5 Blackf. 406; *Throp v. Johnson*, 3 Ind. 343.

⁵ *Dashiel v. Collier*, 4 J. J. Marsh. 601; *Taylor v. Brodrick*, 1 Dana, 345; *Mahoney v. Young*, 3 Dana, 588; *Lawson v. Morton*, 6 Dana, 471; *Wall v. Hill*, 7 Dana, 172; *Waters v. Gooch*, 6 J. J. Marsh. 586.

⁶ *Summers v. Babb*, 13 Ill. 483.

⁷ *McClanahan v. Porter*, 10 Misso. 746.

⁸ *Lewis v. James*, 8 Humph. 537.

⁹ *Campbell v. Murphy*, 2 Jones, Eq. 357.

¹⁰ *Wooldridge v. Wilkins*, 3 How. (Missis.) 360; *Markham v. Merrett*, 7 How. (Missis.) 437.

¹¹ *Barney v. Frowner*, 9 Ala. 901; *Beavers v. Smith*, 11 Ala. 20; *Springle v. Shields*, 17 Ala. 295; *Francis v. Garrard*, 18 Ala. 794.

¹² *Coxe v. Higbee*, 6 Halst. 395; *Van Dorn v. Van Dorn*, 2 Penning. 513.

¹³ *Bowie v. Berry*, 1 Md. Ch. Dec. 452; s. c. 3 Md. Ch. Dec. 359.

¹⁴ *Green v. Tennant*, 2 Harring. 336.

lina,¹ Iowa,² Michigan,³ and New Hampshire.⁴ And in several of the States the rule is established by statutory enactment.⁵ Decisions to the same effect have been made in the courts of Virginia;⁶ but now by statute in that State, it is provided, that whether the proceedings of the widow be against one claiming under an alienation by the husband in his lifetime, or against the heirs or devisees, or their assigns, a recovery of dower shall be of a third of the estate as it is when the recovery is had.⁷ By a subsequent section, however, it is declared, that on application of one claiming under an alienation made by the husband in his lifetime, a court of equity may grant him relief from such recovery, on the terms of his paying to the widow, during her life, lawful interest from the commencement of her suit, on one-third of the value, at the husband's death, of the real estate so aliened, deducting the value of such permanent improvements then existing, as may have been made (after the alienation) by the alienee or his assignees.⁸

24. In a learned opinion by Mr. Justice Story,⁹ prepared after careful examination of the authorities, the following observations occur in regard to the true reason for the distinction taken between the rights of the alienee and of the heir, where money or labor has been expended in improving the land. "It is not quite so easy to ascertain upon what ground the exception in favor of purchasers was first admitted to prevail. The reason assigned in Lord Hale's manuscripts, already cited,¹⁰ (for it is not assigned in the Year Books), is not, as Mr. Chief Justice Tilghman has, with great force and acuteness shown,¹¹ a satisfactory reason. Admitting what is certainly true, that upon a feoffment with warranty the heir is not bound to warrant, if he specially show the matter, except according to the value of the land at the time of the feoffment; this estab-

¹ *Russell v. Gee*, 2 Mill, (Con. Court), 254; *Brown v. Duncan*, 4 M'Cord, 346.

² *Corriell v. Bronson*, 6 Clarke (Iowa), 471.

³ *Johnston v. Vandyke*, 6 M'Lean, 422.

⁴ *Johnson v. Perley*, 2 N. H. 56, 58.

⁵ 2 Comp. Laws Mich. p. 851, § 7; Rev. Stat. Wis. 1858, p. 546, § 7; Stat. Minn. 1858, p. 408, § 7; Stat. Oregon, 1855, p. 406, § 7; 1 Rev. Stat. Ohio, p. 522, § 19; 2 Rev. Stat. Ky. by Stanton, p. 27, § 10.

⁶ *Tod v. Baylor*, 4 Leigh, 498; *Braxton v. Coleman*, 5 Call, 433.

⁷ Code Va. 1849, p. 475, § 11.

⁸ Code Va. 1849, p. 476, § 12.

⁹ In *Powell v. Mon. & Brimf. Man. Co.*, 3 Mason, 347, 369.

¹⁰ Ante, § 6.

¹¹ Ante, § 22.

lishes no more than that a covenant of warranty, in construction of law, extends only to the recovery of such value. It does not touch the point, whether any contract between third persons ought to prejudice the right of dower, or whether the tenant in dower ought to be abridged of the general rights which attach to other persons entitled to the freehold. If there be no warranty upon the alienation, there is no pretence to say, that that fact could operate as a just bar to dower, because the feoffee could not recover over. How, then, can the case be varied by the fact, that there is a warranty to a limited extent and value? Nor can the exception be explained by considering the improvements as not falling within the dowerable estate, not being part of any lands or tenements which were the husband's at any time during the coverture, for that is equally true of improvements by the heir. I do not find that in respect to purchasers, any distinction is admitted, whether the improvements are made with or without notice of the right to dower, or before or after the husband's death.¹ And yet if the improvements are made after the husband's death, with knowledge of the right of dower, it is as much the folly of the purchaser to build without assigning dower, as it would be of the heir. The only difference is, that the heir must be presumed to know whether there are other lands sufficient for the dower; the purchaser may not. The rule may have originated, as has been supposed, in the policy of promoting the prosperity of the country, by encouraging improvements in agriculture and building; though so wise and philosophical a spirit seems scarcely to belong to so early an age, fettered with feudal tenures and military services. The anxiety to promote alienations and subinfeudations, and thus to disentangle inheritances from some of their numerous burthens, may have induced the courts to adopt the rule as founded in general justice. Be this as it may, it is now admitted to constitute a fixed maxim of the common law; and in all the American cases in which it has been brought into controversy, its obligatory force has been fully established."

25. A purchaser under execution occupies the same position in regard to improvements made by him, as if the premises had been conveyed by deed directly from the husband.²

26. But if the husband make a conveyance upon condition, and

¹ See ante, § 17.

² *Ayer v. Spring*, 9 Mass. 8; *Summers v. Babb*, 13 Ill. 483; *McClanahan v. Porter*, 10 Misso. 746.

the grantee afterwards improve the lands, and the estate of the latter is then defeated by entry of the husband for a breach of the condition, the husband thereby becomes seized of his former estate,¹ and his widow will be entitled to dower of the improvements as well as of the lands. The grantee in such case has no reasonable ground of complaint, since it was his own folly and imprudence to make improvements upon lands which he held by so uncertain a tenure.² And the same rule holds with respect to improvements by one who has disseized the husband.³

Date of the alienation.

27. Where the husband conveys by absolute deed, the date of its execution and delivery fixes the period of the alienation. If he mortgage the land, and afterwards release the equity of redemption, the time of the release is to be regarded as the time of alienation.⁴ If he give a title-bond, conditioned for a conveyance on payment of the purchase-money, and deliver possession, and afterwards the purchase-money is paid, and a title obtained by the purchaser, the date of the bond must be considered the period at which the interest of the husband was determined.⁵ In a case where the husband, by contract, sold a parcel of land, and agreed to deliver possession and execute title on a certain day upon payment of the purchase-money—but died before the time fixed—and his widow continued to occupy a portion of the premises for several years, and until her dower was assigned; it was held, that the purchaser was entitled to be relieved from the payment of a sum equal to one-third the value of the land at the time of the contract, until the death of the dowress, on his securing its ultimate payment without interest, by a lien on the land.⁶

Mode of enforcing a claim for improvements.

28. If the purchaser would avail himself of the circumstance

¹ Vol. i., ch. xiv., §§ 3-5.

² 1 Roper, H. & W. 350.

³ Perk. § 328; 1 Roper, H. & W. by Jacob, 350. See vol. i., ch. xiv., § 2.

⁴ Hale v. James, 6 John. Ch. 258. The widow is dowable of improvements made by the husband as mortgagor. Ibid.; Purrington v. Pierce, 38 Maine, 447; 4 Kent, 66. See vol. i., ch. xxviii., § 28; ch. xxix., § 43.

⁵ Wilson v. Oatman, 2 Blackf. 223. In this case, the title was obtained after the husband's death. See vol. i., ch. xxviii., §§ 15-21.

⁶ Springle v. Shields, 17 Ala. 295.

that the lands have been increased in value by improvements made since the alienation, it is necessary that he should put his claim upon the record by a proper plea or suggestion, and not controvert the right of the demandant to dower.¹ In a case in Massachusetts, issue was taken on the demandant's marriage and on her husband's seizin, and the court said:² "As to the improvements, the question is not open to the tenant upon these pleadings. The demandant might have been restrained to the value of the land as it was at the time of the extent of the execution against the husband; but we can not, from these pleadings understand that any improvements have been made since that time, or of what nature or value, to be excluded from the judgment to be rendered." In another case³ in the same State, where the tenant, who was a purchaser, pleaded that he could not deny the right of the demandant to be endowed, but that he had made improvements on the land, and that he had always been ready to render to the demandant her reasonable dower, according to her just rights in respect to the increased value of the land, and that on such a day he assigned a third part of the land, in the condition in which it was at the time of the alienation, by metes and bounds; and prayed that the increased value might be inquired of; upon demurrer, it was held,

¹ Stearns, Real Act. 317; 1 Washb. R. P., 2d ed., 240. The following form of a plea in such case has been adopted in Massachusetts: And the said A. comes and says, that he can not deny the action aforesaid of the said M., nor but that the said M. ought to be endowed of the tenements aforesaid, with the appurtenances, as of the endowment of the said J. S., heretofore the husband of the said M. But the said A. says, that the said J. S. in his lifetime, to wit, on the, &c., by his deed of that date, duly acknowledged and recorded, for a valuable consideration therein mentioned, granted, bargained, and sold the tenements aforesaid, with the appurtenances, to one J. N. in fee simple; which estate of the said J. N. in the said tenements, with the appurtenances, the said A. now has. And the said A. further says, that the said tenements, since the conveyance thereof by the said J. S. to the said J. N. as aforesaid, *have been greatly improved and increased in value* by the said J. N., and those who have held the said tenements under him, and especially by him the said A., and that *he has always been ready*, from the time of the death of the said J. S., and yet is ready to render to the said M. her reasonable dower in the said tenements, with the appurtenances, according to the just rights of the said M., in respect of the improvements and increased value thereof, as aforesaid. And the said A. prays that the improvements and increased value of the said tenements, made as aforesaid, may be inquired of, in such manner as the court here shall consider, &c. Stearns, Real Act. App., No. 86.

² Ayer v. Spring, 10 Mass. 80. See s. c. 9 Mass. 8, and Taylor v. Brodrick, 1 Dana, 345; post, § 32.

³ Stearns v. Swift, 8 Pick. 532.

that the tenant's plea, as a plea in bar, was bad; and that it must be construed as an admission of the demandant's right to recover dower according to the value of the estate at the time of the alienation, and a denial of her right to be endowed of the improvements.

29. In *New York*, in the case of *Humphrey v. Phinney*,¹ one of the pleas interposed, was to the effect that the lands had been conveyed by the husband; that valuable improvements had been made thereon subsequently to the conveyance; and that since the death of the husband, the defendant had been, and was still ready, to set off one-third of the premises in value, as at the time of the conveyance. To this plea there was a general demurrer; and in disposing of the questions arising thereon, Kent, C. J., said: "We are of opinion that the fact of *tout temps prist* is well pleaded. Such a plea is according to precedents in cases where the tenant wishes to preclude the demandant from her claim to damages.² She would not be entitled to any in the present case, as the husband did not die seized; but the plea is proper, in order that the demandant may be obliged to take her judgment specially, according to the tender. The general judgment that she recover seizin of a third part of the premises according to the count, might, perhaps, preclude the tenant from the benefit of the valuation for which he contends. Instead of demurring, she ought to have prayed for judgment according to the tender." This ruling was affirmed in *Allan v. Smith*.³ But these cases, while sustaining the sufficiency of a plea of *tout temps prist*, in the form above indicated, do not determine that the claim for improvements may not be brought to the attention of the court in some other form. On the contrary, it was held in *Dolf v. Basset*,⁴ that the value of the improvements may be ascertained, either by the jury upon the trial of the issue, or by the sheriff on the writ of seizin, or by a writ of inquiry, founded on proper suggestions. And the court add: "In this case, as the issues have been already tried, recourse must be had to one of the two latter modes above suggested." Subsequently, in the case of *Yates v. Paddock*,⁵ it was suggested, that proof to reduce the dower to the value at the time of the alienation, should be given to the commissioners on making the admeasurement, and not in the action.⁶

¹ *Humphrey v. Phinney*, 2 John. 484.

² Co. Litt. 32 b.; Rast. Ent. 236 b., 237 a. See post, ch. xxv.

³ *Allan v. Smith*, 1 Cow. 180, 188.

⁴ *Dolf v. Basset*, 15 John. 21.

⁵ *Yates v. Paddock*, 10 Wend. 528.

⁶ See, also, *Leonard v. Steele*, 4 Barb. 20; *Parks v. Hardey*, 4 Bradf. 15.

30. In New Jersey, a plea "that the demandant ought not to have one-third part of the lands, because they were alienated from the husband, who ceased to have seizin of them in his lifetime, and afterwards, in his lifetime, the defendant made great and valuable improvements thereon," was held bad, and ordered to be stricken out.¹ The court declared that the matter set up in the plea constituted no bar to the action. "It is," they said, "only ground for an application after judgment, to the equity of the court. Not to impugn the judgment or execution, but to direct the sheriff or his inquest." But it has been determined in Kentucky, that if the tenant rely on his improvement of the property, he must plead it.²

31. In regard to the mode of ascertaining whether the lands in which dower is demanded have been rendered more valuable by the improvements of the tenant after the alienation of the husband, Mr. Stearns says:³ "Probably no settled practice exists in our courts upon the subject. Perhaps the most correct, as well as the most convenient method, would be, (after the proper allegation and request has been put upon the record by the tenant,) to have the increased value found by the jury, at the bar of the court, in the manner of the inquiry as to the value of the improvements made by the tenant, and those under whom he claims, in writs of entry. Or, with the assent of the parties, it might, perhaps, be more conveniently determined by an *assessor*, named by them, or by the court." Chancellor Kent, in *Humphrey v. Phinney*,⁴ says that the value, independent of the improvements, must be ascertained after judgment, either by the sheriff, on the writ of seizin, or by a writ of inquiry, founded on the suggestion of the demandant; but he avoided giving any opinion as to the proper course of the subsequent proceeding. In discussing the point in *Dolf v. Basset*,⁵ the court remarked: "It has been settled by this court, that dower is to be taken according to the value of the land at the time of alienation. But in what manner, and at what time that value is to be ascertained, has not been decided. It is barely hinted at in the case of *Humphrey v. Phinney*, and the books do not furnish us with much light on the subject. As it is an inquiry growing, in some measure, out of the statute, the court has an unquestionable right to adopt such practice as shall seem most expedient. This

¹ *Coxe v. Higbee*, 6 Halst. 395.

² *Taylor v. Brodrick*, 1 Dana, 345.

³ Stearns, Real Act. 317.

⁴ *Humphrey v. Phinney*, 2 John. 484; ante, § 19.

⁵ *Dolf v. Basset*, 15 John. 21.

value can only be ascertained in one of three ways: either by the jury upon the trial of the issue, or by the sheriff on the writ of seizin, or by a writ of inquiry founded on proper suggestions; either of which would probably be unexceptionable."¹ In *Yates v. Paddock*,² Nelson, J., said: "By the Revised Statutes, vol. 2, p. 306, § 22, the defendant, in an action of ejectment to recover dower, may plead the general issue in the form there stated; and by § 23, may give in evidence any matter, which, if pleaded in the former action of dower, would bar the plaintiff. Under this section, if it were now as formerly, necessary for the security of the defendant's rights in a case of this kind, to show upon the trial the alienation of the husband in his lifetime and tender according to value at that time, in order to limit the extent of the recovery, evidence of the facts might be given under the plea of the general issue, within the spirit of this provision. It would not be necessary, if admissible, to plead them. The judgment, however, would be the same as when the matter was pleaded, and which was for the plaintiff, notwithstanding the tender. But it is not now essential, or even proper, to go into evidence on the trial, in order to determine whether the husband aliened during his lifetime, or not, as that fact, and consequently a tender of one-third of the value of the premises at that time are wholly immaterial, for it will be seen from the cases referred to, that the plea of tender was material only for the purpose of limiting the recovery to the value at the time of alienation, and not to defeat the action."³ The 2 R. S. 490, § 13, provides that the commissioners appointed to admeasure dower shall take into view any permanent improvements made upon the premises out of which dower has been or is sought to be recovered since the alienation thereof by the husband. The defendant, therefore, now can avail himself of proof before the commissioners to reduce the dower to the value of the land at the time of alienation, which it was formerly necessary to make, or the fact may be established by plea before judgment. The action now tries only the right to dower; the extent or measure of it is settled by the commissioners."

32. In Kentucky, the facts must be tried by a jury, who determine what portion of the property, in its improved state, will be

¹ To the same effect, *Shaw v. White*, 13 John. 179. See, also, *Coxe v. Higbee*, 6 Halst. 395; cited in preceding section.

² *Yates v. Paddock*, 10 Wend. 528.

³ *Humphrey v. Phinney*, 2 John. 484; *Allan v. Smith*, 1 Cow. 188.

equivalent to one-third without the improvements; for which, to be allotted by metes and bounds by the sheriff, the widow will have judgment.¹ "Had the lots, or any of them," said the court, in the case cited, "been enhanced in value by the appellant, as a purchaser from the husband, it was his duty to aver that fact, and thus have shown, that the appellee was not entitled to as much as she claimed. Had he filed an appropriate plea for that purpose, and the appellee had not replied to it, the judgment should have been according to the plea; or had an issue of fact been concluded, a jury should have been impanelled to try it, and should have ascertained, from proof, the value of each lot as unimproved, and the value of each as improved, (since the alienation from the husband), and thus fixed the true standard for admeasurement of dower;—for example, if they found that a lot had been improved by the appellant, as a *bonâ fide* alienee from the appellee's husband, and had ascertained that, without such improvement, it would be worth one thousand dollars, but that, as thus improved, it was worth two thousand dollars, the appellee should be endowed of one-sixth, instead of one-third, and the judgment should be, that the sheriff assign to her, by proper metes and bounds, one-sixth in value of the land so improved—equal to one-third without such improvement. *The proportion of value to be allotted for dower, must be fixed by the judgment*; and whenever it shall be less than one-third, in consequence of improvements, it should be ascertained in court, upon a proper issue; or in consequence of an appropriate plea."²

33. Some courts have suggested, that if practicable, the assignment should be so made as to include in the share of the tenant, his own improvements.³

¹ Taylor v. Brodrick, 1 Dana, 345.

² In the case of Johnston v. Vandyke, 6 McLean, 422, 430, in Michigan, the verdict of the jury contained a finding "that in 1816, (the date of the alienation), the farm (in which dower was claimed) was worth but \$1,800; that it has been improved by its various proprietors, to the amount of \$8,000, and is now worth \$40,000, inclusive of these improvements." Wilkins, J., said, (p. 435): "The commissioners (to make admeasurement) inspect the premises, determine their value, and set off one-third of the same to the widow. So much, then, of the special verdict as finds the value of the land in 1816, and in 1850, is immaterial, as unnecessary. The issue for the jury was, whether or not the plaintiff was entitled to dower, and their finding the marriage and seizin and death of the husband, and demand of dower, comprehended their entire duty. It is for the commissioners to admeasure the value of the premises." See post, § 34.

³ Coates v. Cheever, 1 Cow. 460; Leggett v. Steele, 4 Wash. C. C. 305. See 2 Rev. Stat. N. Y. p. 490, § 13, directing this to be done.

34. In providing a method for ascertaining the extent and value of the improvements, it is obvious that care should be taken not to deprive the parties of the privilege of adducing evidence on the subject of the claim, according to the established usages and rules of the law. In this country,—particularly in our large and growing cities,—changes in the ownership of real estate are of frequent occurrence, and improvements involving large expenditures of money are constantly being made. Sometimes old buildings are taken down and new ones erected in their stead; sometimes a portion of the old structure is retained and incorporated with the new. As a consequence of these mutations, it becomes exceedingly difficult in many cases, after the lapse of years, to show satisfactorily the true condition of the property in which dower is claimed, at the period of the husband's alienation, and a resort to the testimony of witnesses is absolutely essential to the administration of justice. It is important, also, that a full opportunity be afforded for cross-examination, that the usual tests in ascertaining the knowledge, and means of knowledge, of the witness, may be applied. In some of the States, it appears to be the practice simply to direct in the order to commissioners for the assignment of dower, that they exclude from their estimate of value, all improvements made after the husband parted with his title, thus devolving upon the commissioners the duty and responsibility of inquiring into and determining, with the aid of such evidence as may be accessible to them, and without hearing the formal proofs and allegations of the parties, questions which are frequently of the highest importance. The proper course would seem to be, as determined in the case in Kentucky, to settle all controverted questions in regard to alleged improvements, before the writ or order for the assignment of dower goes out; and to carry into the judgment or decree of the court, a clear and definite finding as to the extent to which the value of the land has been enhanced thereby.

Increase in value arising from extrinsic causes.

35. Under the doctrine of the English courts, which entitles the widow to dower according to the value of the lands at the death of her husband, or at the time of the assignment,¹ it follows that she

¹ Ante, §§ 5, 8-17.

not only receives the benefit of all improvements made, but also of the increased value, if any, arising from other causes. In the latter particular, the law in most of the American States, corresponds with that of England.

36. The point seems to have been first noticed by Chief Justice Parsons, in the case of *Gore v. Brazier*.¹ After stating that the improvements of the purchaser were protected against the claim of dower, the chief justice, proceeded: "If the lands have greatly risen in value, not from any improvements made upon them, nor from the discovery of any new sources of profit, but from extrinsic causes, as the increase of commerce or population, it may be a question whether on the *extendi ad valentiam* the lands to be recovered in recompense would be valued at the increased price, so that the quantity might be proportionably reduced. This is here a question of mere curiosity, unless it should be considered as relating to the lands to be assigned to the widow for her dower. If the husband, during the coverture, had aliened a real estate in a commercial town, and at his death the rents had trebled from various causes unconnected with any improvements of the estate, and the widow should then sue for her dower, perhaps it would be difficult for the purchaser to maintain that one ninth part only, and not one third part, should be assigned to her."

37. The foregoing case, however, did not call for a determination of the question thus incidentally discussed; but it subsequently came before the Supreme Court of Pennsylvania, and it was held by that court, that the widow is entitled to the benefit of the increased value arising from extrinsic causes.² In the case referred to, the premises in which dower was claimed, were situate in the city of Pittsburgh, and had been improved by the purchaser, and had also greatly increased in value by the growth of the city and other causes distinct from any buildings or improvements made by him. The opinion was delivered by Tilghman, C. J., who said: "So far as concerns improvements made by the alienee, it is agreed that the tenant shall be protected from this hardship; but as to any value which may chance to arise from the gradually increasing prosperity of the country, and not from the labor or money of the alienee, it would be hard indeed upon the widow, if she were pre-

¹ *Gore v. Brazier*, 3 Mass. 523, 544.

² *Thompson v. Morrow*, 5 Serg. & R. 289. See ante, § 21.

cluded from taking her share of it. She runs the risk of any deterioration of the estate, which may arise either from public misfortune, or the negligence, or even the voluntary act of the alienee;¹ for although he destroy the buildings erected by the husband, the widow has no remedy, nor can she recover any more than one-third of the land as she finds it at the death of her husband." After noticing some of the authorities relating to improvements by the alienee, the chief justice proceeded: "But even granting that the tenant who vouches the heir, can recover from him only according to the value at the time of the alienation, this being the true construction of the warranty, the wife of the feoffor, who is no party to the warranty, ought not to be injured by it. So far as her rights are concerned, she ought not to be affected, but by those reasons of policy and justice which apply to her case; reasons which extend only to improvements made by the feoffee. As the Year Books are principally relied on, by those who contend that the widow is to recover according to the precise value at the time of the alienation, I endeavored to trace the subject through those books, but met with great difficulty, from the imperfection of the printed editions. I believe I have seen all which have ever been printed. . . . I have found no adjudged case in the Year Books confining the widow to the value at the time of the alienation by her husband, where the question did not arise on improvements made after the alienation. In our own State, it does not appear that the point now in question has been decided, although I have certainly considered the general understanding to be, that the widow should have the advantage of all increase of value, not arising from improvements made after the alienation."

38. The rule above laid down was adopted by Mr. Justice Story, after an elaborate review of the authorities, in the case of *Powell v. Monson & Brimfield Manufacturing Company*.² The learned judge, in his opinion in that case, referred in terms of commendation to the reasoning of C. J. Tilghman in *Thompson v. Morrow*, and thus concluded: "This doctrine appears to me to stand upon solid principles, and the general analogies of the law. If the land has, in the intermediate period, risen in value, she receives the benefit; if it has depreciated, she sustains the loss."³ Her title is consummate

¹ Post, §§ 46-49.

² *Powell v. Mon. & Brimf. Man. Co.*, 3 Mason, 347.

³ Post, §§ 46-49.

by her husband's death, and, in the language of Lord Coke, that 'title is to the quantity of the land, viz., one just third part.' If, on the other hand, the value of the land has increased solely from the improvements made upon it, and without those improvements it would have remained of the same value as at the time of the alienation, the old value, and not the improved value, is to be taken into consideration. For practical purposes, it is impossible to make any distinction between the value of the improvements and the value resulting from the improvements; between improvements which operate on a part of the land, and those which operate upon the whole. Upon the whole, my judgment is, that the dower must be adjudged according to the value of the land in controversy at the time of the assignment, excluding all the increased value from the improvements actually made upon the premises by the alienees; leaving to the dowress the full benefit of any increase of value arising from circumstances unconnected with those improvements."

39. The law is established in conformity to the doctrine of these cases, in Massachusetts,¹ Maine,² Pennsylvania,³ Ohio,⁴ Indiana,⁵ Kentucky,⁶ Tennessee,⁷ Illinois,⁸ Missouri,⁹ North Carolina,¹⁰ New Jersey,¹¹ Maryland,¹² Delaware,¹³ Michigan,¹⁴ and Mississippi.¹⁵

¹ *Gore v. Brazier*, 3 Mass. 523; *Stearns v. Swift*, 8 Pick. 532; *Powell v. Mon. & Brimf. Man. Co.*, 3 Mason, 347.

² *Mosher v. Mosher*, 15 Maine, 371; *Hobbs v. Harvey*, 16 Maine, 80; *Carter v. Parker*, 28 Maine, 509; *Manning v. Laboree*, 33 Maine, 343.

³ *Thompson v. Morrow*, 5 S. & R. 289; *Benner v. Evans*, 3 Penn. 456; *Shirtz v. Shirtz*, 5 Watts, 255. See *Winder v. Little*, 1 Yeates, 152; *Leggett v. Steele*, 4 Wash. C. C. 305.

⁴ *Dunseth v. Bk. U. S.*, 6 Ohio, 76; *Allen v. McCoy*, 8 Ohio, 418.

⁵ *Smith v. Addleman*, 5 Blackf. 406; *Throp v. Johnson*, 3 Ind. 343. See *Wilson v. Oatman*, 2 Blackf. 223.

⁶ *Dashiel v. Collier*, 4 J. J. Marsh. 601; *Taylor v. Brodrick*, 1 Dana, 345; *Lawson v. Morton*, 6 Dana, 471; *Wall v. Hill*, 7 Dana, 172. See *Waters v. Gooch*, 6 J. J. Marsh. 586; *Mahoney v. Young*, 3 Dana, 588.

⁷ *Lewis v. James*, 8 Humph. 537.

⁸ *Summers v. Babb*, 13 Ill. 483.

⁹ *McClanahan v. Porter*, 10 Misso. 746. ¹⁰ *Campbell v. Murphy*, 2 Jones, Eq. 357.

¹¹ *Coxe v. Higbee*, 6 Halst. 395; *Van Dorn v. Van Dorn*, 2 Penning. 513.

¹² *Bowie v. Berry*, 1 Md. Ch. Dec. 452; s. o. 3 Md. Ch. Dec. 359.

¹³ *Green v. Tennant*, 2 Harring. 336.

¹⁴ *Johnston v. Vandyke*, 6 McLean, 422. See, however, 2 Comp. Laws Mich., p. 851, § 7; post, § 45.

¹⁵ *Wooldridge v. Wilkins*, 3 How. (Missis.) 360; *Markham v. Merrett*, 7 How. (Missis.) 437. See, also, the observations of the court in *Corriell v. Bronson*, 6 Clarke (Iowa), 471.

40. But in New York, the rule is otherwise settled, and the widow is limited, in the estimate of value, to the period of the alienation.¹ The point was not noticed in *Humphrey v. Phinney*,² but was discussed in *Dorchester v. Coventry*,³ and the conclusion of the court there was, that no distinction could be taken between improvements and the increased value of the land. This ruling was followed in *Shaw v. White*,⁴ where the court declared that "the widow does not have the benefit of the improvements, or of the increased value or appreciation of the land;" and in *Allan v. Smith*,⁵ where a plea tendering dower in the land at its value when conveyed by the husband, was sustained.

41. Chancellor Kent, in his opinion in the case of *Hale v. James*,⁶ has the following observations upon this subject: "It might, possibly, be made a question, whether the widow is entitled to the advantage of any increase in the value of the land by extrinsic causes, and not from actual improvements, or whether she was still to have one-third of the rents, or one-third of the land, or whether the quantity of each was to be reduced to the value at the time of alienation. Suppose a valuable mine of coal or ore, or a valuable spring of mineral or salt water should be discovered on the land subsequent to the alienation; or suppose some revolution in commerce, or some great internal improvement, as the line of a canal, for instance, should suddenly increase the land in the hands of the purchaser a hundredfold, would the widow take her dower at this increased value? I state these points without giving any opinion upon them, for they do not arise in this case." Judge Story, in the case of *Powell v. Monson & Brimfield Manufacturing Company*,⁷ after reviewing and approving the authorities which deny to the widow the value of improvements made by the purchaser, and stating the doctrine of the earlier New York cases, thus refers to the opinion of Chancellor Kent in the above case: "That learned judge went again elaborately into the doctrine, and adhered to the rule already laid down, viz., the value of the land at the time of the

¹ *Dorchester v. Coventry*, 11 John. 510; *Shaw v. White*, 13 John. 179; *Dolf v. Basset*, 15 John. 21; *Allan v. Smith*, 1 Cow. 180; *Walker v. Schuyler*, 10 Wend. 480; *Van Gelder v. Post*, 2 Edw. Ch. 577; *Parks v. Hardey*, 4 Bradf. 15. See *Hale v. James*, 6 John. Ch. 258.

² *Humphrey v. Phinney*, 2 John. 484.

³ *Dorchester v. Coventry*, *supra*.

⁴ *Shaw v. White*, *supra*.

⁵ *Allan v. Smith*, *supra*.

⁶ *Hale v. James*, 6 John. Ch. 258, 261, (1822).

⁷ *Powell v. Mon. & Brimf. Man. Co.*, 3 Mason, 347, 373; ante, § 24.

alienation, acting upon it as a clear rule of the common law. With the most profound respect for so great a judge, I must be permitted to doubt if there be any such doctrine in the common law." In reply to this, the chancellor, in a note to his Commentaries, says:¹ "I am rather of the opinion that they [the common law authorities] do warrant the doctrine, to the extent the chancellor meant to go, viz., that the widow was not to be benefited by improvements *made by the alienee*. That position does not seem to be denied; and in *Hale v. James*, as well as in *Humphrey v. Phinney*, nothing else was decided, for nothing else was before the court. In the former case, the chancellor did not mean to give any opinion on the distinction between the increased value arising from the acts of the purchaser and from collateral causes; and so he expressly declared."²

42. In his Commentaries, Chancellor Kent gives his unqualified indorsement to the rule as established in most of the States. "The better and the more reasonable American doctrine," he says,³ "I apprehend to be, that the improved value of the land from which the widow is to be excluded, in the assignment of her dower, as against a purchaser from her husband, is that which has arisen from

¹ 4 Kent, 68, note.

² Mr. Sedgwick, in his work on the "Measure of Damages," says, (p. 131), that as to the point of admeasurement of dower, "some perplexity exists;" and "the greatest authorities of American law, Chancellor Kent and Judge Story, are divided," since, he remarks, "the latter holds that the widow shall have the benefit of improvements made by the heir, but not those made by the purchaser;" while "on the other hand, the former declares it to be the ancient and settled rule of the common law that the widow takes her dower according to the value of the land at the time of its alienation, and not according to its subsequent or improved value, though he assented to the right of the dowress to be allowed for increased value arising from extrinsic or general causes." Mr. Rawle, in his work on "Covenants for Title," (2d ed., pp. 336, 337, note,) thus explains this supposed contrariety of opinion: "On examination, however, it may be doubted whether there is any conflict of authority as to the rule itself. Each cites the opinion of the other with approbation, and the only difference of opinion seems to be as to its source." After quoting from the opinion of Judge Story and from the note of Chancellor Kent, the author adds: "There is, then, no conflict of authority as to the rule, its reason, or its application, but merely as to its source; one learned judge being of opinion that it is derived from the common law, and the other that the common law authorities do not recognize it." Lord Denman, it will be remembered, maintains that the common law gives to the widow the advantage of all improvements, whether made by the heir, or by the alienee; and that she is not confined to the value at the date of the alienation. Ante, §§ 8-17.

³ 4 Kent, 68.

the actual labor and money of the owner, and not from that which has arisen from extrinsic or general causes." Notwithstanding this expression of opinion, the Supreme Court of New York, in the case of *Walker v. Schuyler*,¹ adhered to the doctrine of the earlier cases. "Whether the chancellor is correct or not in this conclusion," remarked Savage, C. J., "I am not to inquire. It is sufficient for my purpose that in this State the widow's rights have been frequently adjudicated under a statute like the present statute, and we are not at liberty to depart from the construction which has been given to it. I may, however, remark, that any other rule than that adopted by this court would be difficult of application. It is not easy to say how much of the appreciated value has arisen from the labor and money expended upon the land. In this very case, some of the witnesses state that the whole improved value arises from the improvements made upon the land in question and the other lands in the same portion of the country, all of which were of little value when this lot was sold by the husband of the plaintiff; and they say that as this lot is enhanced in value by improvements on the adjoining lots and those in the vicinity, so those lots have been enhanced in value by the improvements on this; and thus each lot may be said to be enhanced in value by the labor and money expended upon it by its own owner. This is certainly true to a great extent, if not to the full extent of the enhanced value. Can any one say what would have been the present value of the lot in question, if the whole western part of the State had remained as it was in 1792? and what would the plaintiff's dower be worth if the whole country was a wilderness? It must be mere conjecture. It is certainly reasonable that the enhanced value should inure to the benefit of those through whose labor and sufferings and expenditures the appreciation has been procured. If the property has been rendered more valuable by the general improvement of the country, the defendant, and not the plaintiff, has contributed to that general improvement."²

43. In Virginia, also, it has been held, that the widow is excluded from participation in the advantages resulting from the growth in value from extrinsic causes.³ This was determined in *Tod v. Bay-*

¹ *Walker v. Schuyler*, 10 Wend. 480.

² See, also, *Parks v. Hardey*, 4 Bradf. 15.

³ But see Code Va. 1849, p. 475, § 11; p. 476, § 12; ante, § 23.

lor.¹ In that case, the distinct question involved, was upon an objection to the decree below, directing the dower to be allotted according to the value with all the improvements made by the purchaser. The court were unanimous in the reversal of the decree; but upon the question of increased value from other causes, the judges differed in opinion. Judge Carr, (with whom Judge Cabell, concurred), said that he considered it "the clear rule of the common law, that the widow is not entitled to dower according to the improved value of the land; but must take her dower according to the value at the time of the alienation."² Judge Tucker did not fully concur with the majority. "I think the law very clear," he observed, "that in laying off the dower, improvements made by the purchaser, should be excluded from the estimate, except that improvement in the productive character of the soil, which arises from the course of husbandry. In like manner I am of opinion, that the accession of value, arising merely from the progress of society, and the general progressive increase in the value of the lands, consequent upon increasing wealth and population, can not be thrown into the scale of the purchaser, or diminish the quantity of land to which the widow will be entitled. But on this point my brethren differ from me."³

44. The same rule seems to have been adopted in South Carolina.⁴ In Alabama, in the case of *Barney v. Frowner*,⁵ the court were in doubt as to whether the widow should be permitted to share in the increased value arising from general causes. In *Beavers v. Smith*,⁶ she was restricted to the value of the premises at the time of the alienation. The same rule was applied to the case of *Francis v. Garrard*.⁷

45. By statute in Michigan,⁸ Wisconsin,⁹ Minnesota,¹⁰ and Ore-

¹ *Tod v. Baylor*, 4 Leigh, 498.

² The following authorities were cited by the learned judge: *Fitzh. Abr. tit. Dower*, § 192; *Perkins*, § 328; *Hargr. Co. Litt.* 32 a., note 8; 1 *Rep. on Prop.* 346; 4 *Kent*, 64; *Humphrey v. Phinney*, 2 *John.* 484; *Hale v. James*, 6 *John. Ch.* 258.

³ See, also, *Braxton v. Coleman*, 5 *Call*, 433; post, § 44.

⁴ *Russell v. Gee*, 2 *Mill*, (Con. Court), 254; *Brown v. Duncan*, 4 *M'Cord*, 346.

⁵ *Barney v. Frowner*, 9 *Ala.* 901.

⁶ *Beavers v. Smith*, 11 *Ala.* 20; post, § 47.

⁷ *Francis v. Garrard*, 18 *Ala.* 794. And see *Springle v. Shields*, 17 *Ala.* 295; *Thrasher v. Pinckard*, 23 *Ala.* 616, to the same effect.

⁸ 2 *Comp. Laws Mich.* p. 861, § 7.

⁹ *Rev. Stat. Wis.* 1858, p. 546, § 7.

¹⁰ *Stat. Minn.* 1858, p. 408, § 7.

gon,¹ where a widow is entitled to dower out of lands which have been aliened by the husband in his lifetime, and such lands have been enhanced in value after the alienation, the estimate of value in assigning the dower, shall be made according to the value of the lands at the time they were aliened.

*Deterioration in the hands of the alienee.*²

46. Upon this subject, Perkins says:³ "If a man be seized of land in fee upon which there is a building, so that by reason thereof the land is worth four pence more by the year, and he takes a wife, and enfeoffs a stranger, who takes down the building, and the feoffor dies, his wife shall have dower according to the value of the land as it was at the time of the death of her husband; and hath not any remedy for the taking away of the building before the death of her husband, although the building was upon the same land and in the possession of her husband during the coverture; for a wife hath not right to have possession of her dower before the death of her husband; *tamen quære* of this case." In a note to this section, Mr. Greening, observes:⁴ "An authority upon this point has been sought in vain; and Bacon's Abridgment, Dower, B. 5, appears to be the only book in which it is at all noticed; but the law seems to be as stated in the text; for it is clear that if the buildings had been pulled down by the husband, the wife could have claimed nothing in respect of them; and this privilege, it is apprehended, must be transferred with the estate. And there is no right without a remedy; but, as stated, the wife has no means of recovering the value of the buildings against the feoffee, therefore she has no right. The right to dower, too, as implied in the text, is inchoate only during the husband's life, and not consummate till his death, when (in the case put) the buildings were not in existence."

47. Upon the authority of Perkins, Mr. Jacob lays it down as the rule,⁵ that "if the husband during the coverture, aliens the land, and the alienee impairs the value, as by taking down buildings, it seems that the wife is only entitled to be endowed according to the value at the time of her husband's death." But he adds:⁶ "If the

¹ Stat. Oregon, 1855, p. 406, § 7.

² See ante, ch. xxi., §§ 35, 36.

³ Perk. § 329.

⁴ Perk. 15th ed. § 329, note.

⁵ 1 Roper, H. & W. by Jacob, 350. See, also, Park, Dow. 257.

⁶ 1 Roper, H. & W. 350, note.

alienee impairs the value *after* the husband's death, it may be presumed that the widow would be entitled to have her dower assigned according to the value at that time. For she would otherwise have no compensation for the diminution, as she does not, in this case, recover damages in dower." Mr. Bright considers,¹ that if "it should be held that the widow is entitled to the benefit of improvements made by the alienee after her husband's death, it seems hardly reasonable that she should have compensation for diminution in value."² These observations can hardly be regarded as applicable to those States which deny to the widow the benefit of the improvements of the alienee. In a case³ in Alabama, where a dilapidated mill upon the premises was torn down by a purchaser from the husband, and a new and expensive structure erected in its stead, it was held, that the widow of the grantor was not entitled to any share of the improvements, and that her dower should be set out with reference to the value of the premises at the time of the alienation, though the destruction of the old mill afforded a proper case for compensation to the widow by a court of equity.⁴

48. In the United States, the doctrine laid down by Perkins,⁵ that the widow has no remedy for waste committed by the alienee during the lifetime of the husband, seems to be generally acquiesced in.⁶ And the rule is the same as to any diminution in value before the assignment of dower, proceeding from natural causes.⁷ In the case of *Braxton v. Coleman*,⁸ the estate sold by the husband had a mill standing upon it which was subsequently carried away and another built in its stead. Afterwards a third mill upon a more extensive plan was erected. It was held, that the widow was dowerable of the land only, and not of the mill.

49. In New York, as we have seen,⁹ the period of the alienation is taken as the date at which the value of the premises is to be estimated in assigning the dower. And it seems, as a result of this rule, that no depreciation occurring after that time can diminish

¹ 1 Bright, H. & W. 386, pl. 89.

² See ante, ch. xxi., §§ 35, 36.

³ *Beavers v. Smith*, 11 Ala. 20.

⁴ 1 Washb. R. P., 2d ed., 239, 240.

⁵ Ante, § 46.

⁶ *Thompson v. Morrow*, 5 S. & R. 289, 291; *Powell v. Mon. & Brimf. Man. Co.*, 3 Mason, 347, 375; *Dunseth v. Bk. U. S.*, 6 Ohio, 76; *McClanahan v. Porter*, 10 Misso. 746; *Braxton v. Coleman*, 5 Call, 433; 4 Kent, 67; 1 Washb. R. P., 2d ed., 237, 239.

⁷ Ibid.

⁸ *Braxton v. Coleman*, *supra*.

⁹ Ante, §§ 40-42. See, also, §§ 43-45.

the share of the widow. This point was decided by Chancellor Kent, in *Hale v. James*.¹ In that case, the lands had diminished in value between the date of the conveyance by the husband and the period of his death; and it was claimed by the purchaser that the widow should take her dower according to the value at the last named date. "If the husband dies seized," said the chancellor, "the heir may assign the dower when he pleases; and if he neglects it, and improves the land by cultivation or buildings, before the assignment, it is his own voluntary act, with knowledge of his rights; and the widow takes the value in that case, as it is at the time of the assignment."² The rule is fixed and steady; and whether the land be improved in value, or whether it be impaired in value,³ in the time of the heir, the endowment is still to be according to the value at the time of the assignment. And why should not the rule be equally fixed in the present case? The purchaser ought not to be exclusively entitled to his election, to take the time from the alienation, or from the husband's death, as may best suit his interest. It would be very unreasonable to give that election to the purchaser, and deny any choice to the widow. The rule, to be equal and just, must be mutual. If the purchaser is entitled to take the period of the husband's death, when the land has depreciated since his purchase, the widow ought to be entitled to take the same period, if the land had risen in value. It is not to be supposed that the period can be ambulatory, at the choice of the purchaser, and that the widow shall have no choice in the case. But there is no color in the books for the suggestion, that the time is unsettled, and depending on the volition of either party. It may suit the interest of the defendant to take the period of the husband's death in this particular case; and perhaps in the very next case that arises, it might equally suit his interest to take the period of the alienation for the estimate of the value. The rules of law, are, however, not subject to such alternation; and it is settled from time immemorial, and on principles of justice and sound policy, that the value of the dower, in case of alienation by the husband, is to be taken at the time of the alienation, and not subsequently, and the rule is not to be disturbed to suit the views of one party."⁴

¹ *Hale v. James*, 6 John. Ch. 258.

² *Ante*, ch. xxi., §§ 30-34.

³ *Ante*, ch. xxi., §§ 35, 36.

⁴ See the reasoning of Lord Denman, as to the period when the value is to be estimated, quoted *ante*, §§ 8-17.

*Exoneration of the estate conveyed where the husband dies seized of other lands.*¹

50. In the English case of *Grigby v. Cox*,² part of the plaintiff's bill appears to have been framed upon the idea that a purchaser of part of an estate which is subject to dower has an equity to have the dower turned upon the part remaining unsold, in discharge of the part purchased. In that case, the estate had been settled, on the marriage of the defendant and his wife, subject to the dower of the mother, to the separate use of the wife, who appointed part to the plaintiff. He filed a bill to have the effect of this bargain, and also praying that he might be decreed to receive the rents and profits of this part of the estate free from the deduction of the mother's dower. It does not appear from the report that the mother was a party to the bill. The observations of Lord Hardwicke on this part of the prayer of the bill are scarcely intelligible, and probably depend upon specialties of the case which the report does not develop. "As to the exoneration of this part of the lands from the mother's dower," he remarked, "by turning it on the other part of the estate, which still is settled to the separate use of the wife, that depends on the appointment of the wife, whether she was bound by that appointment to do so; for as to the covenant by the husband that it is free from dower, that will not affect the wife; nor has plaintiff a title to that decree against her; but has a remedy against the husband. The power of the wife was under this settlement, which is made subject to the dower, she being to receive the rents and profits to her separate use, over and above the dower, which ran over the whole. Then if the wife made an appointment, it was only over and above the dower; the plaintiff then must rely on that covenant to indemnify and make him satisfaction."³

51. In a case⁴ in New York, where the husband sold several lots of land, in which his wife had a contingent right of dower, to various individuals, and conveyed such lots with warranty, and afterwards died seized and possessed of a large real and personal estate, which he devised to the complainant in trust for his daughter; and the trustee, after the death of the testator, offered to assign to the

¹ See ante, ch. v., § 52.

³ Park, Dow. 281.

² *Grigby v. Cox*, 1 Ves. Sen. 517.

⁴ *Wood v. Keyes*, 6 Paige, 478.

widow her dower out of the estate of which the husband died seized, as well for that estate as for the lands sold and conveyed by her husband with warranty, which offer she refused, and commenced ejectment suits against the several purchasers for the purpose of recovering her dower in each lot separately; it was held by Walworth, Chancellor, that the widow was in equity bound to accept an assignment of the whole dower out of the estate of which her husband died seized, and which was ultimately liable to sustain the whole charge of her dower right in the lands conveyed with warranty.

52. And in Kentucky, where the estate sold by the husband was not a distinct tract, but only a part of a larger tract, it was adjudged that his widow was not entitled, as a matter of course, to dower in each parcel of the original tract thus severed by the sale of a part of it.¹ "If her entire dower in the whole tract," the court observed, "including the part sold to Morton, could (as we infer that it might) have been allotted to her in the part remaining unsold, the court ought so to have allotted it, and thereby have avoided injustice to Morton, and the circuitry and contingencies of another suit by him against his vendor's representatives."

¹ *Lawson v. Morton*, 6 Dana, 471.

CHAPTER XXIII.

ASSIGNMENT OF DOWER IN THE RENTS AND PROFITS.

§ 1-4. In what cases dower should be assigned in the rents and profits.	widow's proportion where the lands have been sold.
5-12. Mode of estimating the widow's proportion of the annual profits.	19, 20. Deduction on account of the liability of the widow to impeachment for waste.
13-18. Mode of determining the	

In what cases dower should be assigned in the rents and profits.

1. THERE are many hereditaments, of which, by the common law, the widow is required to be endowed specially of a third part of the rents and profits.¹ As of a piscary;² offices;³ a fair;⁴ a market;⁵ a dove-house;⁶ courts, fines, heriots;⁷ and the keepership of a park.⁸ So dower in mines,⁹ in a mill,¹⁰ or in a ferry,¹¹ may be assigned in the same manner. The entirety, however, of any such hereditaments may, by agreement of competent parties, be assigned to the widow in allowance of her dower of other property.¹² And it seems, that although a third part of the profits only be assigned to the wife, she shall thereby have the freehold of a third part of the hereditament itself.¹³

2. By statute in most of the United States, it is provided, that where the estate of which a woman is dowable is entire, and no division by metes and bounds can be made without injury thereto, dower shall be assigned in a special manner, as of a third part of the rents, issues, and profits.¹⁴ There is a distinction, however,

¹ Co. Litt. 32 a.; Park, Dow. 113, 252; vol. i., ch. x., § 3.

² Viz., *tertium piscem, vel jactum retis tertium*. Co. Litt. 32 a.

³ Ibid.; Fitzh. N. B. 8, note (b), 149 (K).

⁴ Ibid.

⁵ Ibid.; Gilb. Dow. 371.

⁶ Co. Litt. 32 a.

⁷ Ibid.

⁸ Ibid.

⁹ Stoughton v. Leigh, 1 Taunt. 402; Coates v. Cheever, 1 Cow. 460; 1 Roper, H. & W. 397; Park, Dow. 254. See ante, ch. xxi., §§ 23-29.

¹⁰ Co. Litt. 32 a.; Perk. § 342; Park, Dow. 252. See ante, ch. xxi., § 29.

¹¹ Stevens v. Stevens, 3 Dana, 371.

¹² Ante, ch. iv., §§ 22-35.

¹³ Park, Dow. 253. See Fitzh. N. B. 8, note (b), 149 (K).

¹⁴ Gen. Stat. Mass., p. 697, § 8; p. 469, § 5; Rev. Stat. Maine, 1857, ch. 103, § 5; p. 607, § 26; N. H. Comp. Stat. 1853, p. 420, § 6; 1 Stat. Ill. 1858, p. 156, § 28;

between the profits issuing from the land itself and a sum in the form of a rent charged upon the land. In the case of *White v. Story*,¹ Bronson, J., considers it questionable whether a rent can be assigned in lieu of dower, except by consent,² but in Chase's case,³ Bland, Chancellor, expresses the opinion, that where the property is incapable of division, dower may be assigned in the form of a rent, distrainable of common right.

3. In South Carolina, where an order for the assignment of dower issues from a court of equity, it should be in the alternative, requiring the commissioners to set off the dower by metes and bounds, if the premises will admit of division; otherwise that they assess a sum of money in lieu of it.⁴ And if a sum of money be assessed, the return should show that the lands could not be divided.⁵ In Pennsylvania, it has been held, that a finding by the inquest of the annual value of the estate, where the husband did not die seized, is illegal; and that the sheriff should deliver seizin of one-third of the lands, and lay it off by metes and bounds.⁶

4. In Iowa, if the referees appointed to set off the share of the widow report that the property, or any part of it, can not be readily divided, the court, if satisfied with such report, may order the whole to be sold and one-third of the proceeds paid over to the widow; but such sale shall not take place if any one interested to prevent it will give security to the satisfaction of the court, conditioned to pay to the widow the appraised value of her share, with ten per cent. interest on the same, within such reasonable time as the court may fix, not exceeding one year from the date of such security. If no such arrangement is made, the widow may keep the property by giving a like security to pay off the claims of the other parties interested upon like terms. And in order that the sale may

1 Rev. Stat. Ohio, p. 521, § 14; p. 594, § 147; Rev. Stat. R. I. 1857, p. 503, § 2; p. 504, §§ 11, 13; Dig. Stat. Ark. 1858, p. 456, § 43; 1 Brev. Dig. Stat. S. C., p. 271, § 8; Gen. Stat. Verm., p. 413, § 8; 2 Comp. Laws Mich., p. 852, § 11; Rev. Stat. Wis. 1858, p. 547, § 11; Stat. Minn. 1858, p. 408, § 11; Stat. Oregon, 1855, p. 406, § 11; 1 Rev. Stat. Misso. 1855, p. 676, §§ 35, 36; p. 679, § 48; Comp. Laws Kansas, 1862, p. 482, §§ 24, 25.

¹ *White v. Story*, 2 Hill, 543, 549.

² See ch. iv., §§ 22-35.

³ Chase's case, 1 Bland, Ch. 206.

⁴ *Gibson v. Marshall*, 5 Rich. Eq. 254; post, ch. xxiv., §§ 49-56.

⁵ *Heyward v. Cuthbert*, 2 Con. Court (Treadw.), 626; s. c. 3 Brev. 482. See *Francisco v. Hendricks*, 28 Ill. 64.

⁶ *Benner v. Evans*, 3 Penn. (Penr. & W.) 454.

not be forced at unfavorable times, or contrary to the wishes or interests of those interested, it is further provided, that such sale shall not be ordered so long as the parties interested shall express a contrary desire, and shall agree upon some mode of sharing and dividing the rents, profits, or use of such property, or shall consent that the court divide it by rents, profits, or use.¹

Mode of ascertaining the widow's proportion of the annual profits.

5. Whether, where the estate can not be divided, and the widow is to be endowed in a special manner, the annual income which it will yield, or the actual value of the property in the market, is to be taken as the basis of the estimate, is a point upon which the courts are not agreed. In most cases, there is a material difference between the annual legal interest upon what may be regarded as the fair market value of an estate and its annual rents and profits. Sometimes, owing to the nature of the improvements, the annual rents will exceed the annual interest upon such value; but generally, they fall below it. In a case in Maryland, the land in question was estimated to be worth no more than four per cent. per annum on its gross value;² and in another case, in which the premises had been sold, the interest on the sum produced by the sale, was nearly twice as much as the net annual rent.³ This distinction has been noticed in works treating of agricultural subjects. "Whatever a farm will sell for," says one author, "fixes its value as merchandise; but by no means is it a fair measure of its value as a permanent farming capital. The true value of land, and also of any permanent improvements to land, I would estimate in the following manner: ascertain as nearly as possible the average clear and permanent incomes, and the land is worth as much money as would securely yield that amount of income in the form of interest, which may be considered as worth six per cent."⁴ It is to be observed, that the writer here quoted, distinguishes between the value of land as a subject of trade, and its value as an investment with a view to annual returns from its annual products. Where the object is to

¹ Act of April 8, 1862; Laws of Iowa, 1862, p. 174, § 2, repealing § 2478 of the Revision of 1860. By § 1 of the same Act, the widow takes one-third of the estate absolutely, instead of one-third for life as under the Revision of 1860.

² Addison v. Bowie, 2 Bland, Ch. 613.

³ Williams' case, 3 Bland, Ch. 278, 279.

⁴ Ruffin on Calcareous Manures, ch. 18.

make profit from the sale of the land, the probability of future increase in value, especially in a young and growing country, is an important element to be considered, and greatly increases the difference between the amount of the rents and issues and the legal interest upon the estimated value for such purpose. But where it is a question of income, the annual product of the estate, seems to be the true criterion of value; and the prospective appreciation or depreciation in its market value, can only affect the result, in so far as it will probably enhance or diminish the future rents and profits. In England, it appears to be the practice to determine the value of land by reference to the amount of its actual income.¹

6. It seems clear, that at common law, in making a special endowment, no inquiry is had concerning the value of the estate itself, but simply of its rents and profits, and of these, one-third part is set off to the widow. This is manifest in the case of a mill, and of mines, where the dowress enjoys the property in proportionate alternate periods, or receives a share of the actual profits.² And it is apprehended, that upon principle, this should be the rule in all cases in which this form of endowment is adopted. It may be said, that if the dower were assigned by metes and bounds, so as to let the widow into possession, it would be in her power to dispose of her life interest in the land itself at its market value, and thus realize in proportion to the value of the entire estate; and that she ought not to be prejudiced by reason of the indivisible nature of the property. But it should be remembered, that in some cases, the annual rents exceed the interest upon the market value of the premises; and in these cases, it would be to the advantage of the widow to take the rents instead of the interest. Her right to do this would be unquestioned, if the assignment were by metes and bounds; and she might with equal propriety say, in this, as in the case above supposed, that her interests should not be prejudiced because the assignment could not be made in that form. But the principles upon which the value of the dower is to be estimated, ought not to be left at the option of the widow; some general rule should be adopted, applicable to all cases alike. In several of the States, this has been done, in accordance with the views above

¹ *Badger v. Badger*, Mosely, 117; *Peacock v. Evans*, 16 Ves. Jr. 516; *Williams' case*, 3 Bland, Ch. 242-3, 278-9; post, ch. xxiv., § 4.

² Ante, ch. xxi., §§ 23-29.

expressed. Thus, in Illinois,¹ Missouri,² and Kansas,³ if the property can not be divided, the jury are required to fix its annual value, and the court to direct the annual payment of the widow's proportion. And it has been held in Missouri, that the yearly value of a widow's dower in land not susceptible of a division, when she accepts an annual sum in lieu thereof, is its gross annual product, deducting charges to which it is subject, such as taxes and repairs.⁴ The same doctrine is recognized in North Carolina,⁵ and has the unqualified approval of Chancellor Bland.⁶ In Arkansas, the statute directs, that if the lands are not capable of division, they shall be rented out, and one-third part of the proceeds paid to the widow in lieu of dower.⁷ And it has been decided in Kentucky, that the widow may use the estate every third year, at her election, or receive one-third of the future rents.⁸

7. In Ohio, in the case of *Bank of the United States v. Dunseth*,⁹ it was objected that by the decree an annual sum charged upon the rents, was given to the widow, instead of one-third of the rents themselves as they subsequently accrued. The court said: "We believe that when dower is assigned in a special manner, it would be most convenient to all parties, to ascertain the gross value of the dower estate, derived by a computation of the value of the estate, and the risk of life of the dowress, and directing payment, by which the estate of the dowress is determined. For then the amount of the incumbrance is ascertained at once, and both the dowress and the tenant are relieved from the risk of much unpleasant collision. But the statute authorizes a different adjustment in a 'special manner,' leaving the details to the discretion of the court, and where no palpable injustice is done, we should not disturb it."

8. In Tennessee, in a case where real estate had been sold at a

¹ 1 Stat. Ill. 1858, p. 156, § 28; *Francisco v. Hendricks*, 28 Ill. 64. In *Gove v. Cather*, 23 Ill. 634, it was suggested, that after a decree allowing a widow a yearly sum in lieu of her dower, the allowance may be changed upon filing a bill, if the income of the property be materially increased or diminished.

² 1 Rev. Stat. Misso. 1855, p. 676, §§ 35, 36; p. 679, § 48.

³ *Comp. Laws Kansas*, 1862, p. 482, §§ 24, 25. See, also, the statutes cited ante, note to § 2, to the same effect.

⁴ *Riley v. Clamorgan*, 15 Misso. 331.

⁵ *Atkins v. Kron*, 8 Ired. Eq. 1.

⁶ *Williams' case*, 3 Bland, Ch. 242-3, 278-9.

⁷ *Dig. Stat. Ark.* 1858, p. 456, § 43.

⁸ *Hyzer v. Stoker*, 3 B. Mon. 117.

⁹ *Bk. U. S. v. Dunseth*, 10 Ohio, 18.

chancery sale, and the purchaser, believing that he had acquired a good title, placed valuable improvements upon it for the manufacture of iron, and it appeared on bill filed, that the estate was subject to dower; it was held, that inasmuch as it would be inequitable for the complainant to be benefited by the improvements at the expense of the defendant, or for her to be admitted to a partnership in the manufactory, it would be proper, and the court had the power to decree an annual payment of money to the complainant in lieu of dower, equivalent to the annual value of her interest in the estate, and a decree was entered accordingly. But the decree was so shaped as to provide that if at any time thereafter the works should cease to secure to her the amount from any cause whatever, she should then have her interest laid off by metes and bounds and be let into possession of the same.¹

9. In several of the States, however, the estimated value of the land is taken as the basis upon which the allotment to the widow is to be made. Thus, in New York, in the case of *Hale v. James*,² it was held by Chancellor Kent, that where it is agreed between the widow and the tenant, that he shall allow her a yearly sum, instead of having the dower assigned to her according to law, the *interest* of the value of the premises at the time of the alienation by the husband, is the proper measure of the annuity. And that where the house and buildings on the land constitute the principal value of the premises, a deduction of one per cent. should be allowed as a compensation to the tenant on account of necessary repairs, and the risk of loss by fire. This holding was followed by the vice chancellor, in the case of *Van Gelder v. Post*.³ There, the husband was seized as tenant in common of an undivided fourth part of certain lands, which were sold during the coverture, under proceedings in partition to which the wife was not a party, and by which, therefore, she was not bound. The husband's share of the proceeds of the sale, amounted to two thousand two hundred dollars; and as dower could not be conveniently assigned by metes and bounds, the vice chancellor decreed to the widow for her dower, interest upon one-third of that sum during her life, from the date of her husband's death; the arrears to be paid at once; and the sums subsequently accruing to be paid in the form of an annuity, and to be charged

¹ *Lewis v. James*, 8 Humph. 537.

² *Hale v. James*, 6 John. Ch. 258.

³ *Van Gelder v. Post*, 2 Edw. Ch. 577.

upon the lands, unless some other form of security should be agreed upon or approved.

10. So, in Alabama, the rule is, that where a compensation for dower is to be made in money, the decree should not be for one-third of the net rents and profits, but for the annual interest on one-third the value of the premises.¹

11. In assigning to the widow a share of the actual income of the estate, to be received by her annually during her life, it is obvious that an estimate must be made of the prospective rents and profits; for it can not be known with certainty what the future income will be. In the older States, where the lands have long been improved, and their average annual product can be readily ascertained, this may, perhaps, be satisfactorily done, but in other portions of the country it is attended with many difficulties. Some of these are well stated by Ruffin, C. J., in the case of *Atkins v. Kron*,² where he says: "In the most of Europe, and, perhaps, in some parts of this country, the annual income, received in the form of rent, may be anticipated almost as certainly as interest on capital in money. The price, also, of the fee in possession, is much the same, take the country throughout, in the end, as at the beginning of the same life. But, in all those particulars there is the utmost uncertainty here; an uncertainty so great, that no general rule for estimating the value of those different interests can be laid down, which would not do great injustice in, perhaps, more than half the cases which might arise. The income from land is seldom divided by way of rent, but of crops, from the cultivation of the owner; and hence the profits depend much upon what other capital the tenant has besides the land. Those profits, for a course of years to come, can not be computed with any confidence. Besides, it is a fallacy to assume, that the intrinsic value of the land, or the market value, will be the same at the beginning and end of the life estate. We know that depends on such a variety of circumstances, that there can be no positive rule. A rice swamp and other alluvial flats, being all cleared and prepared for successful culture, and

¹ *Beavers v. Smith*, 11 Ala. 20; *Johnson v. Elliott*, 12 Ala. 112; *Fry v. Merch. Ins. Co.*, 15 Ala. 810; *Springle v. Shields*, 17 Ala. 295; *Francis v. Garrard*, 18 Ala. 794. Where the principal value in such case consists of buildings which require an annual outlay to keep them in repair, whether the dowress should contribute a proportion of the expenses, *quære?* *Beavers v. Smith*, 11 Ala. 20. See, also, the South Carolina case of *Douglass v. McDill*, 1 Spears, 139; post, ch. xxiv., § 53.

² *Atkins v. Kron*, 8 Ired. Eq. 1.

of extraordinary fertility, may be so considered. But, in the hill country, and where tobacco or cotton are the crops, under the usual system of tillage by the greater part of our citizens, or even of those who are called prudent and successful planters, we know that, in twenty-five or thirty years, a plantation of ordinary size is so nearly cleared of its timber, and reduced by continued and exhausting cropping and detrition, as often not to be worth half what it was. There is a material difference, in this respect, between different parts of the State, as they may be level or broken, and according to the different crops that are cultivated."

12. In endeavoring to ascertain the probable future profits of an estate, it is plain, that the considerations above suggested, should be taken into the account. If the lands be used for farming purposes, a proper allowance should be made for the uncertainties attending the cultivation of crops for a series of years; the probabilities of diminished fertility in the soil; and, in some localities, for the chances of its ultimate exhaustion. And, on the other hand, it is proper to consider the probabilities as to whether there will be an appreciation in value of the future products of the land. In new and growing portions of the country, where improvements are constantly going on and facilities for reaching the great marts of trade are gradually being introduced and extended, this is particularly the case. But a sudden and temporary inflation in prices, produced by unusual and extraordinary causes, or, by an extravagant spirit of speculation, can scarcely be considered as furnishing reliable data upon which to form an estimate of value. If the property be in a town, or city, its annual profits will, in most cases, consist chiefly in rents. The average yearly receipts in this form may be adopted; or the amount may be increased or diminished, as the future probabilities or particular circumstances of the case may seem to require. In all cases, a proper deduction should be made for current repairs and taxes; and probably, where the income is mainly derived from buildings, for the expense of insurance also.¹

Mode of ascertaining the widow's proportion where the lands have been sold.

13. When lands subject to dower have been sold, and the pro-

¹ Ante, § 9.

ceeds brought into court to be apportioned to the parties according to their respective interests, the question whether the widow is to take the legal interest upon a proportion of the purchase-money, for her dower, or a share of the actual rents and profits in the same manner as if no sale had been made, is attended with considerable difficulty. In some cases, the sale is the result of proceedings founded on a lien or incumbrance paramount to the claim of dower. In others, the rights of the widow are entitled to precedence. Possibly, in view of this distinction, a rule which might be regarded as entirely proper and just in one case, would be considered altogether inapplicable to another.

14. Where there has been a foreclosure and sale under a mortgage in which the widow has joined;¹ or where the sale has been made in satisfaction of a vendor's lien,² or of judgments recovered prior to the attachment of dower;³ in all these cases, the widow is dowable of the surplus only remaining after satisfying the claim of the creditor; and the established practice, where a gross sum is not paid to the widow in extinguishment of her claim,⁴ is to order one-third of the surplus to be invested, and the annual interest accruing thereon to be paid to her during her life.⁵ So, where the administrator of the husband sold an equity of redemption in which the widow was entitled to dower, it was adjudged that she should take the interest during her life upon one-third of the purchase-money.⁶ The same principle is applicable where the widow is endowed of surplus moneys produced by a sale of partnership lands;⁷ or where

¹ *Tabele v. Tabele*, 1 John. Ch. 45; *Titus v. Neilson*, 5 John. Ch. 452; *Swaine v. Perine*, Ibid. 482; *Evertson v. Tappen*, Ibid. 513; *Denton v. Nanny*, 8 Barb. 618; *Mills v. Van Voorhis*, 23 Barb. 125; *Smith v. Jackson*, 2 Edw. Ch. 28; *Reed v. Morrison*, 12 S. & R. 18, 21; *Hartshorne v. Hartshorne*, 1 Green, Ch. 349; *Hinchman v. Stiles*, 1 Stockt. Ch. 361, 454; *Smith v. Handy*, 16 Ohio, 237; *Harrow v. Johnson*, 3 Met. (Ky.) 578; *Rutherford v. Munce, Walker*, 370; *Keith v. Trapier*, 1 Bail. Ch. 63; vol. i., ch. xxiii., § 25.

² *Thompson v. Thompson*, 1 Jones, L. 430; *Klutts v. Klutts*, 5 Jones, Eq. 80; *Williams v. Woods*, 1 Humph. 408; *Thompson v. Cochran*, 7 Humph. 72; *Warner v. Van Alstyne*, 3 Paige, 513; *Brewer v. Vanarsdale*, 6 Dana, 204; *Willett v. Beatty*, 12 B. Mon. 172; *Daniel v. Leitch*, 13 Gratt. 195; vol. i., ch. xx., § 44; ch. xxv., § 4.

³ *Robbins v. Robbins*, 8 Blackf. 174; *Sandford v. McLean*, 3 Paige, 117; vol. i., ch. xxviii., § 33.

⁴ See post, ch. xxiv.

⁵ See preceding citations.

⁶ *Jennison v. Hapgood*, 14 Pick. 345. See, also, *Houghton v. Hapgood*, 13 Pick. 154.

⁷ *Goodburn v. Stevens*, 5 Gill, 1; s. c. 1 Md. Ch. Dec. 420; *Hale v. Plummer*, 6

premises in which the widow of a deceased tenant in common was dowable, have been sold under proceedings in partition carried on by the survivors.¹

15. In cases of the character above enumerated, the right to be endowed of the lands themselves, or of the profits issuing therefrom, is subordinate to the lien or claim under which the sale is made, and must yield to its assertion. As the widow, after the sale, is entitled to no part of the actual profits, it is immaterial to her what their annual value may be. Her claim to endowment is transferred entirely to the surplus moneys which remain, and the measure of profit to be derived from these is the legal rate of interest prescribed by law. But where a sale is made by the personal representatives of the husband for the payment of general debts; or where it occurs in proceedings in partition by the heirs at law; in these, and in like cases, it is very questionable whether the widow can be deprived, against her consent, of the enjoyment of her share of the rents which the estate will produce, or of an annual sum charged upon the proceeds of the sale, equivalent thereto. In many cases, as has been observed,² the legal interest will exceed the annual profits; but not unfrequently, the buildings or other improvements upon the lands yield large returns; and the question is,—not what will probably be to the pecuniary advantage of the widow in a majority of instances, but what is her legal right.

16. It was said by Chancellor Hanson, in a case in Maryland, that where the widow “consents that the land may be sold, she is entitled to the interest of one-third of the money for life.”³ But this proposition was afterwards disputed by Chancellor Bland, who maintained with much force of argument, that the annual rents and profits should form the basis of the assignment to the widow.⁴ “In this instance,” he said, referring to the case before him, “the annual legal interest on the whole purchase-money, would amount to \$2235, when the net amount of the annual rent was no more than \$1400. It seems to have been admitted in this case, that before the sale, the widow could be entitled to no more than one-

Ind. 121; *Matlock v. Matlock*, 5 Ind. 403; *Galbraith v. Gedge*, 16 B. Mon. 631; *Loubat v. Nourse*, 5 Florida, 350; *Dyer v. Clark*, 5 Met. 562; *Howard v. Priest* Ibid. 582; *Burnside v. Merrick*, 4 Met. 537; vol. i., ch. xxvi., § 21.

¹ See vol. i., ch. xvi., § 18-32.

² Ante, § 5.

³ See the opinion of the chancellor quoted in *Williams' case*, 3 Bland, Ch. 269.

⁴ *Williams' case*, 3 Bland, Ch. 242, 243, 278, 279.

third of the rent; and accordingly, of the rent actually received, that proportion has been awarded to her by the auditor; but after the sale, instead of \$466 66, as one-third of the whole rent, she is allowed to claim at the rate of \$745, the one-third of the legal interest on the whole purchase-money. There is an apparent inconsistency in this. And thus, in place of taking the rent or annual price as the basis of the computation, the legal interest of the purchase-money has been assumed as the foundation upon which the calculations for the chancery rule have been made."¹

17. It has been decided in New York and Alabama, as we have seen,² in cases where the right of the widow to be endowed of the lands, or of the rents and profits, had not been impaired by a sale, that the proper rule is to decree to the widow the annual legal interest upon one-third of the value of the premises. It follows, that in those States, the same rule will be applied where the dower is assigned in purchase-money brought into court. By the revised statutes of New York, on a sale of lands by order of the surrogate, if the woman do not consent to receive a gross sum in satisfaction of her dower, the surrogate is directed to set apart one-third of the purchase-money, and cause the same to be invested in permanent securities, on annual interest, the interest to be paid to the widow during her life.³ It is held, that the portion of the money to be set apart and invested pursuant to this statute, is the one-third of the gross amount, and not of the amount less the charges and expenses of the sale.⁴ That a widow's title to dower can not be prejudiced or diminished by debts and incumbrances created by the husband, and therefore she is not to be compelled to contribute to the expenses

¹ Williams' case, 3 Bland, Ch. 278, 279. See, also, *Carll v. Butman*, 7 Greenl. 102; *Simonton v. Gray*, 34 Maine, 50; post, ch. xxiv., § 4.

² Ante, §§ 9, 10.

³ 2 Rev. Stat. N. Y. p. 106, §§ 36, 37. In several of the States, the statutes regulating sales in partition and sales of infants' estates, contain provisions substantially to the same effect. *Nixon's Dig. Stat. N. J.* p. 576, § 23; p. 578, §§ 29-31; 1 Md. Code, pp. 77, 78, §§ 32-34; p. 342, § 63; Code Va. 1849, pp. 536, 537, §§ 9, 10; 2 Comp. Laws Mich. pp. 1251, 1252, §§ 45-49; p. 1254, §§ 62-66; Rev. Stat. Wis. 1858, p. 573, §§ 15, 16; p. 850, §§ 45-49; Stat. Min. 1858, p. 601, §§ 30-34; 2 Rev. Stat. N. Y. p. 196, §§ 181, 182; pp. 325, 326, §§ 50-54; p. 327, § 66; *Purdon's Dig. by Brightly*, p. 295, § 137; p. 297, § 152; Del. Rev. Code, 1852, p. 281, § 17; p. 311, § 4; Rev. Code N. C. 1855, p. 453, § 9; *Cobb's New Dig. Stat. Geo.* p. 230, § 2. See, also, *Herbert v. Wren*, 7 Cranch, 370, 380; *Blair v. Thompson*, 11 Gratt. 441.

⁴ *Higbie v. Westlake*, 14 N. Y. (4 Kern.) 281.

occasioned by the existence of such debts.¹ And it has been suggested, that if the sale be made *subject* to incumbrances created by the husband alone, in determining the amount of "purchase-money," according to the sense of this provision, the charges and liens against the husband should be included; upon the ground that as the lands are sold subject to those liens, they constitute part of the price or consideration paid for them.² Where interest on purchase-money accrues after the sale, and before the distribution, one-third of it belongs to the widow.³

18. In a case in Iowa, a widow claiming dower in certain real estate which had been sold by a trustee, and the proceeds of which were in his hands, made an agreement with him, that if she succeeded in obtaining dower, she would take her interest in money out of the funds in his hands, either absolutely, or for life, according to the opinion of the court as to what her dower would be in the lands sold. The court decreed that she should recover one-third of the purchase-money, and interest for arrears at the rate of ten per cent. per annum; but that the money should not be paid to her until she filed with the clerk a bond with sufficient sureties, conditioned for the repayment of the principal sum, without interest, to the trustee or his legal representatives, immediately on her death. It was held, that the widow, under the agreement with the trustee, was entitled to receive the money, and to control and use it as her own during her life; and that as there was no stipulation for interest at ten per cent., so much of the decree as authorized her to recover that rate was erroneous.⁴

Deduction on account of the liability of the widow to impeachment for waste.

19. There is a material difference in value between the estate of a tenant who is, and that of one who is not liable to impeachment for waste. A tenant for life subject to impeachment for waste, can not sell the timber growing on the lands, nor take the produce of mines unopened, both of which are the property of the person entitled to the inheritance.⁵ Where the entire estate is sold, the pur-

¹ Ibid.; *Lawrence v. Miller*, 1 Sand. S. C. 516; s. c. 2 Comst. 245.

² *Lawrence v. Miller*, 1 Sandf. S. C. 516, 544.

³ *Higbie v. Westlake*, 14 N. Y. (4 Kern.) 281.

⁴ *O'Ferrall v. Davis*, 1 Clarke (Iowa), 560.

⁵ Vol i., ch. x., §§ 10-24; post, ch. xxxi., §§ 20-49.

chase-money is increased by that which belongs to the inheritance, either as the price of the standing timber which the tenant for life could not cut, or as the price of the remainder or reversion from which the tenant for life could have derived no profit; and therefore it would seem to be clearly improper to award to him the interest upon any portions of the purchase-money which represent those prices.¹

20. As a dowress is not permitted to commit waste,² this limitation upon her right to the full enjoyment of the estate should not be lost sight of in estimating the value of her interest. It is evident, however, from an examination of the authorities, that in many instances, this has been entirely overlooked. But there are several reported cases in which it was noticed, and a deduction made from the share to be awarded to the widow on account of it.³ In one of these, the chancellor (Hanson), said:⁴ "The interest in the land which she parts with, is such that she can not sell the timber off the land as a tenant in fee might do. The value, then, of the privilege of selling timber, &c., is to be taken in the account." In a late English case, however, it was held, that the widow, before assignment, had an interest in timber which had been cut down by the heir, and was accordingly entitled for life to a third of the produce which had been paid into court.⁵ And in a case in New Jersey, where the land of which dower was claimed was principally woodland, an injunction was allowed pending the proceedings of the widow, to restrain waste on the part of the defendant and those claiming under him, in cutting down and carrying away the wood.⁶

¹ *Ex parte Artis*, 2 Ves. Sr. 489; *Tracy v. Hereford*, 2 Bro. C. C. 138; *Davis v. Marlborough*, 2 Swanst. 151, 153, note; *Oliver v. Court*, 3 Exch. Rep. 330; *Attersoll v. Stevens*, 1 Taunt. 183; *Maccubbin v. Cromwell*, 2 Har. & Gill, 460; *Williams' case*, 3 Bland, Ch. 243, 244; *Cassanave v. Brooke*, 3 Bland, Ch. 267, 268, note.

² Vol. i., ch. x., §§ 10-24; post, ch. xxxi., §§ 20-49.

³ *Cassanave v. Brooke*, 3 Bland, Ch. 267, 268, note; *Williams' case*, 3 Bland, Ch. 243, 244; *Maccubbin v. Cromwell*, 2 Har. & G. 457; post, ch. xxiv., § 37.

⁴ *Cassanave v. Brooke*, 3 Bland, Ch. 267, 268, note.

⁵ *Bishop v. Bishop*, 13 Law J., N. S. Chan. 302; s. c. 5 Jurist, 931.

⁶ *Harker v. Christy*, 2 South. 717.

CHAPTER XXIV.

ASSIGNMENT OF A GROSS SUM IN LIEU OF DOWER.

§ 1, 2. Introductory.

3-5. Elements entering into the estimate of the present value of estates for life.

6. Instances in which courts of equity are called upon to estimate the present value of estates for life.

7-12. Cases in the English courts of chancery before the formation of tables of the expectation of life.

13-17. English tables of the expectation of life.

18. Difference between the expectation of life and the probabilities of life.

19, 20. Cases in England after the construction of mathematical tables.

21. Expectation of life in the United States, as compared with that in Europe.

22, 23. Difficulties in forming tables of the expectation of life in the United States.

24. Mathematical tables constructed in the United States.

25-32. Extent to which mathematical tables may be relied upon in estimating the probable duration of life.

33. Method in Europe of ascertaining the fee simple value from the rental value.

34. Sale of the fee determines nothing as to the proportion between the particular estate and the reversion.

35-59. Cases in the American courts.

60, 61. Point of time at which the life interest is to be valued.

62. Improvements made by purchaser excluded from the estimate of value.

63. Apportionment of incumbrance.

64. Apportionment not necessary if the incumbrance be left outstanding.

Introductory.

1. IN England, prior to the late dower Act,¹ but few cases arose in practice, in which a widow was entitled to have a proportion, or the annual interest on a share, of the purchase-money of an estate, awarded to her in lieu of dower; and therefore there is little or nothing to be found in the English books as to what should be considered a just equivalent for her interest.² But in the United States, where the widow is dowable of the surplus proceeds of sales made to satisfy paramount incumbrances; and where it frequently becomes necessary, under the statutes of descents, to have lands, of which partition can not be made without disadvantage, sold in order to effect a division of the proceeds among the heirs; and also to

¹ 3 & 4 Will. IV., ch. 105; vol. i., Appendix.

² *Mole v. Smith*, 1 Jac. & Walk. 653.

make sales of the real estate of deceased persons for the payment of their debts, it often happens, that a widow is called upon to accept an equivalent portion of the purchase-money in satisfaction of her dower.¹ And sometimes a gross sum is accepted by her in lieu of her dower in the rents and profits, in cases where no sale has been made.

2. In a number of the States, it is at the option of the widow whether she will take a gross sum, or rely upon annual payments during her life.² In others, the consent of all parties interested is necessary to the assignment of a sum in gross;³ while in others, it seems that the matter is very much in the discretion of the court.⁴

¹ Williams' case, 3 Bland, Ch. 264.

² 2 Rev. Stat. N. Y. p. 106, §§ 36, 37; p. 196, §§ 181, 182; pp. 325-6, §§ 50-54; p. 327, § 66; 2 Comp. Laws Mich. pp. 1251-2, §§ 45-49; p. 1254, §§ 62-66; Rev. Stat. Wis. p. 563, § 17; p. 573, §§ 15, 16; p. 850, §§ 45-49; Stat. Minn. 1858, p. 601, §§ 30-34; Stat. Conn. 1854, p. 498, § 40; 1 Rev. Stat. Ohio, p. 622, § 289; Nixon's Dig. Stat. N. J. p. 576, § 23; p. 578, §§ 29-31; Rev. Code N. C. 1855, p. 453, § 9; Del. Rev. Code, 1852, p. 281, § 17. See Purdon's Dig. by Brightly, p. 295, § 137; p. 297, § 152; Mentzer v. Menor, 8 Watts, 296; Shouffer v. Coover, 1 Watts & Serg. 400; McCarthy v. Gordon, 4 Whart. 321; Higbie v. Westlake, 14 N. Y. (4 Kern.) 281; Lawrence v. Miller, 1 Sandf. S. C. 516; Hazen v. Thurber, 4 John. Ch. 604. Where, in proceedings for partition, a sale has been made, and the widow agrees in writing according to the statute, to accept a gross sum in lieu of her dower, her right thereby becomes vested, and will not be divested by her death before the distribution. In such case, her interest goes to her children. Mulford v. Hiers, 2 Beasl. Ch. 13. But where she dies before a sale of the premises, her estate is determined by her death, and her children can have no claim to any portion of the proceeds of the sale. Ibid. The consent of the dowress to accept a certain amount in lieu of dower may be inferred from her claim to the benefit of a judgment in her favor for such amount in an action to recover her dower. Mathews v. Duryee, 45 Barb. 69.

³ Code Va. 1849, p. 536-7, §§ 9, 10; Cobb's New Dig. Stat. Geo. p. 230, § 2; p. 231, §§ 2, 3; Blair v. Thompson, 11 Gratt. 441; Herbert v. Wren, 7 Cranch, 370, 380; Hill v. Mitchell, 5 Ark. 608; Morrill v. Menifee, Ibid. 629; Beavers v. Smith, 11 Ala. 20; Johnson v. Elliott, 12 Ala. 112; Fry v. Merch. Ins. Co., 15 Ala. 810; Springle v. Shields, 17 Ala. 295; Francis v. Garrard, 18 Ala. 794; Francisco v. Hendricks, 28 Ill. 64. The court is not authorized upon proceedings in partition, to direct that an outstanding claim for dower shall be extinguished by the payment of a gross sum; but the order of sale should protect the dowress, by requiring the sale to be made subject to her right. Francisco v. Hendricks, 28 Ill. 64. See, also, King v. King, 15 Ill. 187.

⁴ Bank U. S. v. Dunseth, 10 Ohio, 18; Brewer v. Vanarsdale, 6 Dana, 204; Mac-cubbin v. Cromwell, 2 Har. & G. 457; Dorsey v. Smith, 7 Har. & J. 356, 366; Williams' case, 3 Bland, Ch. 221, *et seq.*; Abercrombie v. Riddle, 3 Md. Ch. Dec. 320; Goodburn v. Stevens, 1 Md. Ch. Dec. 420; Bowie v. Berry, 1 Md. Ch. Dec. 452; Atkins v. Kron, 8 Ired. Eq. 1. See post, §§ 49-56. By the Maryland Code, in all suits by joint owners to sell lands, the court may decree a sale free from the claim

In practice, however, it frequently occurs in all the States, that the widow and owner of the inheritance mutually agree that the former shall receive a sum certain in lieu of her dower, and refer to the court the question as to the principles upon which her proportion shall be ascertained.¹ In most cases, the correct determination of this question, involves considerations of great practical importance.

Elements entering into the estimate of the present value of estates for life.

3. The putting of a present value upon a life annuity, or upon a certain rent for life, or upon a specified annual life income of any description, necessarily involves a consideration of the chances of life of the individual during whose life such an annual income is claimed; for although other matters must be taken into consideration in making an estimate of its present value, yet it would be difficult to make any calculation as to the duration of a single life, without the aid of some general observations as to the rate of mortality, and the probable duration of such lives in like situations. But a judicial controversy as to the present value of a particular life interest, being, in its nature, confined to an insulated subject, however dependent a full understanding and correct determination of it may be upon the doctrine of chances, can not afford the means of collecting the facts and circumstances on which that doctrine rests, since the doctrine is itself the result of general observations upon previously collected facts and circumstances, in relation to the duration of human life; while the adjudication must neces-

of dower by the wife of any of the parties. 1 Md. Code, p. 78, § 33. In other cases of sale under a decree of the court, the widow can not be compelled to receive a sum in gross in lieu of dower against her consent. Ibid. p. 77, § 32; p. 78, § 34; p. 342, § 63. In Michigan, in suits for dower in lands aliened by the husband in his lifetime, and where dower can not be assigned by metes and bounds without injustice or manifest injury, the court may award and adjudge a sum of money in lieu of dower to be paid to the widow. 2 Comp. Laws Mich. p. 855, § 1.

¹ See *Hazen v. Thurber*, 4 John. Ch. 604; *Hale v. James*, 6 John. Ch. 263; *Evertson v. Tappen*, 5 John. Ch. 513; *Eagle v. Emmet*, 4 Bradf. 117; *Houghton v. Hapgood*, 13 Pick. 154; *Simonton v. Gray*, 34 Maine, 50; *Smiley v. Smiley*, 1 Dana, 93; *Pollard v. Underwood*, 4 Hen. & M. 459; *Davison v. Waite*, 2 Munf. 527; *Sherard v. Sherard*, 33 Ala. 488. An executor, on a sale by the orphans' court, retained a sum of money in his hands to meet the demand for dower or thirds chargeable upon the estate of the testator. Held, that the widow was entitled to recover, and that the executor was the only party chargeable. *Beeson v. McNabb*, 2 Barr, 422.

sarily be, if it proceed upon that doctrine at all, a mere application of it to the particular case. Hence it is, that although judicial investigations may, in such cases, be greatly facilitated by a just application of that doctrine, there is no allusion to any rule for estimating the probable continuance of life to be met with, in any of the reported adjudications, until long after the publication of several essays upon the doctrine of chances in relation to the duration of human life.¹

4. In addition to the various circumstances relative to the expectation of life, it will be necessary to ascertain the annual product of the life interest in order to make a proper estimate of its present value; for, apart from those things having an imaginary value, such as jewels and the like, the true criterion of the value of all property is the actual profit it may be made to produce; and hence it has always been considered most correct to estimate the value of lands, annuities, &c., at so many years' purchase; or, in other words, that the whole estate may be estimated as equivalent to so many years of its income paid at the time of the purchase.² There is, as has been already stated,³ almost everywhere, a material difference between the amount of the annual legal interest on the purchase-money of a fee simple estate in land and the annual amount of the rents and profits. But to ascertain the amount of the legal interest on the purchase-money of an estate, the amount of the purchase-money itself must be first ascertained, which, without an actual sale, can only be done as a matter of opinion; and, therefore, as a guide to such an opinion, reference is had to the amount of its annual income; and as regards an estate for life in land, the annual rents and profits afford the only means of making a correct estimate of its value.⁴

5. But in cases where the land has been sold, and the legal

¹ Williams' case, 3 Bland, Ch. 227; post, §§ 7-12.

² *Freemount v. Dedire*, 1 P. Wms. 429; *Flud v. Flud*, 2 Freem. 210; *Badger v. Badger*, Mosely, 117; *Barnardiston v. Lingood*, 2 Atk. 135; *Gwynne v. Heaton*, 1 Bro. C. C. 2; *Heathcote v. Paignon*, 2 Bro. C. C. 167; *Griffith v. Spratley*, 1 Cox, 389; *Gibson v. Jeyes*, 6 Ves. Jr. 266; *Peacock v. Evans*, 16 Ves. Jr. 512; *Ex parte Thistlewood*, 19 Ves. Jr. 253; *Chalmer v. Bradley*, 1 Jac. & Walk. 59; *Oliver v. Court*, 3 Exch. Rep. 320; *Ryle v. Brown*, 6 Exch. Rep. 265. See Appendix, E.

³ Ante, ch. xxiii., §§ 5, 6.

⁴ Per Bland, Chancellor, in Williams' case, 3 Bland, Ch. 242, 243; *Badger v. Badger*, Mosely, 117; *Peacock v. Evans*, 16 Ves. Jr. 516. See *Atkins v. Kron*, 8 Ired. Eq. 1; ante, ch. xxiii., § 11.

interest upon its proceeds is taken as the measure of the income; or where the courts award to the widow interest upon one-third of the estimated value of the estate, it is, of course, unnecessary to enter into a computation of the annual rents.¹

Instances in which courts of equity are called upon to estimate the present value of estates for life.

6. There are many cases falling within the jurisdiction of courts of equity, in which it becomes necessary to put a present value upon an estate for life. As where land is sold, so that those who have a particular life interest in it are to have an equivalent in value awarded to them out of the proceeds of sale;² or where the expense of renewing a lease is to be apportioned between the tenant who renews and he who takes in remainder or reversion;³ or where the value of the estate of an expectant heir, or of one who takes after a life in being, is to be ascertained;⁴ or where a sum of money is directed to be paid after the death of a person then alive;⁵ or where the expense of repairs is to be apportioned between a particular tenant and a reversioner or remainder-man;⁶ or where the burden of an incumbrance is to be taken off in due proportion by several particular tenants and the owner of the inheritance;⁷ or where a person charged with the payment of an annuity becomes insolvent, or dies leaving an insufficiency of assets to pay all;⁸ or where there is not a sufficiency of assets to pay all the legacies and annuities given by the testator;⁹ or where an annuity given as an advancement is brought into hotchpot;¹⁰ or where a pension or annuity for life has been given by the government.¹¹ In these and

¹ As to the proper deductions on account of repairs, taxes, &c., and the liability of the widow to impeachment for waste, see ante, ch. xxiii., §§ 9, 19, 20.

² *Wells v. Roloson*, 1 Bland, Ch. 457, note.

³ *White v. White*, 9 Ves. Jr. 554.

⁴ *Collet v. Wollaston*, 3 Bro. C. C. 228; *Gowland v. De Faria*, 17 Ves. Jr. 21.

⁵ 1 Price, Obs. 33.

⁶ *Strike's case*, 1 Bland, Ch. 77.

⁷ *Long v. Short*, 1 P. Wms. 403.

⁸ 1 Petersd. Abr. 710, 713; *Ex parte Thistlewood*, 19 Ves. Jr. 236; *Johnson v. Compton*, 6 Cond. Ch. R. 20.

⁹ *Long v. Short*, 1 P. Wms. 403; *Devon v. Atkins*, 2 P. Wms. 381; *Hume v. Edwards*, 3 Atk. 693; *Lewin v. Lewin*, 2 Ves. Sr. 417; *Williams, Executors*, 836, 842.

¹⁰ *Kircudbright v. Kircudbright*, 8 Ves. Jr. 51.

¹¹ 1 *Madison Papers*, 280, 320.

all similar cases, where the *corpus*, or whole body of the estate is to be disposed of and distributed at once in just proportions, a determination of the present value of all the life interests is necessarily involved.¹

Cases in the English courts of chancery before the formation of tables of the expectation of life.

7. The earliest case in relation to this matter, appears to be one decided by the High Court of Chancery of England in 1661, and from the language used in the report of it, there is room to infer, that it was the first in which any question as to the proportional value of a particular estate and a reversion or remainder had ever been presented for determination. It appears that Hannah, the widow of Sharp, who had left her a considerable estate, married Geering, her second husband, who settled upon her certain land for life as a jointure; that they mortgaged the jointure; after which Geering died, and she married Rowel, with whom she filed a bill to redeem; and a question arose in what manner a redemption should be made, and by whom; whether by Hannah, or by the infant heir of Geering; and by whom the mortgage money should be paid. Upon which it was said, that the court conceived it most just, that Hannah and the infant heir should proportionably pay what was due upon the mortgage, at the time of the death of Geering, the mortgagor, rating the estate for life of Hannah at one-third, and the reversion in fee at two-thirds, from the time of the death of Geering.² In the year 1671, the same rule of proportion was applied in a similar case.³ In 1682, on a bill to redeem, it was declared to be the ordinary rule of the court, that one-third of the redemption money should be paid to the tenant for life, and the residue to the remainder-man.⁴ In 1692, on a bill by a reversioner against the tenant for life to discover incumbrances, and to compel him to bear his proportion, it was held, that the tenant for life should pay two parts in five of the debts, and the remaining three-fifths should be borne by the reversioner.⁵ In 1696, it was

¹ Williams' case, 3 Bland, Ch. 221, 222.

² Rowel v. Walley, 1 Cha. Rep. 219.

³ Cornish v. Mew, 1 Ca. Ch. 271.

⁴ Brent v. Best, 1 Vern. 70; Clyat v. Batteson, 1 Vern. 404; Thynn v. Duvall, 2 Vern. 117.

⁵ James v. Hales, 2 Vern. 267; s. c. Prec. Ch. 44.

again, in each of two distinct cases, laid down, that on a bill to redeem, the tenant for life must pay one-third, and the reversioner two-thirds of the mortgage debt.¹ In 1710, on a bill by a remainder-man to compel the tenant for life of a lease for years to have it renewed, it was held, that the tenant for life should pay one-third of the expense of renewal, and the remainder-man the residue.² In 1718, on a bill brought by creditors, it appeared that the deceased debtor had, on his marriage, covenanted to settle lands that should be of the value of sixty pounds per annum, upon his wife for life, which he had failed to do. Upon which it was held, that the wife should come in only as a specialty creditor; and in order to settle the *quantum* of her demand, an estimate was directed to be made of the value of her estate for life, at so many years' purchase, upon which she was to be let in as a specialty creditor for so much money.³ And in 1750, a similar question having arisen, it was determined, that the tenant for life should pay one-third of the fine and charges of renewing a lease, and that the two-thirds should be paid by the remainder-man.⁴

8. No explanation is to be found in any of these cases of the principles of equity upon which the court proceeded in fixing the proportion in which the tenant for life and the reversioner should contribute. It does not, however, seem to have been adopted as an absolute rule, but rather as one of convenience; for, in a case of this kind determined in 1697, it was said, that in adjusting what each estate should pay, each was to be valued at what it was worth to be sold.⁵ In the first of the before recited cases, it was asserted in general terms, that the rule was most just; yet it is fair to presume, that Hannah, at the time of the death of her second husband, when her life estate was estimated as being equal to one-third of the whole, must have been far advanced in life. The proportions fixed by the case decided in 1692 seem to have been considered in 1720, as a departure from the general rule.⁶ In one of the cases decided in 1696, it was said, that the rule seemed hard, because an estate for life was then worth nine or ten years' purchase, whereas formerly it was worth but seven;⁷ and in the case deter-

¹ *Ballet v. Spranger*, Prec. Cha. 62; *Flud v. Flud*, 2 Freem. 210.

² *Lock v. Lock*, 2 Vern. 666.

³ *Freemoult v. Dedire*, 1 P. Wms. 429.

⁴ *Verney v. Verney*, 1 Ves. Sr. 428.

⁵ *Heveningham v. Heveningham*, 2 Vern. 355.

⁶ *Anonymous*, 1 P. Wms. 650.

⁷ *Flud v. Flud*, 2 Freem. 210.

mined in 1750, it was remarked, that the apportionment to the tenant for life of one-third of the burden was wrong, as being too low;¹ that is, in not laying enough upon him.²

9. In the year 1717, an executor having paid debts to a large amount, and doubts having arisen about the application of the different kinds of assets, there being a deficiency of personalty to pay all the debts, he filed a bill to obtain the direction of the court. Upon which it appeared, that the testator, being seized in fee of some land, and possessed of a lease for years in other lands, and indebted by specialty and simple contract, devised an annuity of forty pounds a year, out of the lease for years, to one grandson, and the lease itself to another grandson, and likewise devised all his lands in fee to A. and his heirs. None of the devisees were his heirs at law. It was held, that, to prevent the disappointment of the testator's intent, the devisee of the fee simple estate, and the devisee of the lease, and of the annuity, should each contribute to the debts by specialty. And, for that purpose, it was, among other things, directed, that the master should ascertain what, at the testator's death, was the value of the lands devised in fee, and of the lease, and also of the annuity; and, to lay the deficiency rateably upon the same according to their respective values; and to state what part necessarily must, and what part most conveniently might, be sold for that purpose.³ In 1726, on a bill by a devisee in remainder of an estate *pur autre vie*, it was held to be personal estate which could not be devised away from creditors; nevertheless, being a specific devise, that all the rest of the testator's personal estate, not specifically devised, should be first applied to pay the debts; and, if there were any other specific devise, it should come in average with this, and pay its *proportion*; but if that would not serve, that then all should be sold to pay the testator's debt.⁴ And in 1749, it was held, that a devisee of an annuity for life charged on the personal estate, where there was a deficiency of assets, should abate in *proportion* with the other legatees.⁵

10. In the year 1738, in a case of bankruptcy, it appeared that

¹ Verney v. Verney, 1 Ves. Sr. 428; White v. White, 4 Ves. Jr. 34.

² White v. White, 9 Ves. Jr. 557.

³ Long v. Short, 1 P. Wms. 403; Franks v. Cooper, 4 Ves. Jr. 763.

⁴ Devon v. Atkins, 2 P. Wms. 381; Lewin v. Lewin, 2 Ves. Sr. 415; Rogers v. Millicent, Dick. 570.

⁵ Hume v. Edwards, 3 Atk. 693.

the petitioner had, in the year 1720, paid three hundred pounds for an annuity of thirty pounds per annum for her life, payable out of the estate of the bankrupt. Upon her petition to be admitted as a creditor for the whole three hundred pounds, it was ordered that the commissioners settle the value of her life; and that she be admitted a creditor for such valuation, and the arrears of her annuity, it being unreasonable that she should have the whole three hundred pounds when she had enjoyed the annuity eighteen years.¹ The same principles are evidently as applicable to a condition of insolvency as to that of bankruptcy; and therefore, to abolish a technical distinction which had been introduced by the courts of common law in relation to insolvency,² it has been enacted in England, that a present value shall, in all such cases, be put upon the annuity, and the annuitant be let in to that amount only as a creditor against the estate of the insolvent.³

11. In 1687, on a bill to be relieved against a conveyance, it appeared that the plaintiff, being entitled to an estate tail, after the death of his father, in lands, which, if in possession, were worth, to be sold, about 800*l.*, did, in 1671, for 30*l.* paid, and 20*l.* per annum secured to be paid to him during the lives of him and his father, absolutely convey his remainder in tail to the defendant's father and his heirs. The conveyance was set aside as being an unrighteous bargain in the beginning.⁴ In the year 1716, on a bill brought to set aside a sale of a remainder, the case appeared to be, that the plaintiff's father was tenant for life, remainder to the plaintiff in tail, remainder over to a third person; that the plaintiff had married, and had a son. After which, the plaintiff being about thirty years of age, and the son ten years old, and when the plaintiff's father was ancient and sickly and in declining life, the plaintiff sold his estate in remainder to the defendant for 1050*l.* The estate at the time was worth 150*l.* per annum. The chancellor decreed relief on the payment of principal, interest, and

¹ *Ex parte Le Compte*, 1 Atk. 251; *Ex parte Belton*, 1 Atk. 251; *Bothomly v. Fairfax*, 1 P. Wms. 334, note; *Ex parte Artis*, 2 Ves. Sr. 489; *Ex parte Cater*, 1 Bro. C. C. 267; *Ex parte Burrow*, 1 Bro. C. C. 268.

² *Cotterel v. Hooke*, Doug. 97; *Webster v. Bannister*, Doug. 393.

³ 1 Geo. IV., ch. 119, § 10; 1 Petersd. Abr. 714, note; Smith, Mer. Law, 409; *Ex parte Thistlewood*, 19 Ves. Jr. 249; *Johnson v. Compton*, 6 Cond. Ch. R. 20; *Lyde v. Mynn*, 6 Cond. Ch. R. 229.

⁴ *Nott v. Johnson*, 2 Vern. 27.

full costs; upon the ground, that the amount paid for the estate in remainder dependent upon so frail a life, was so entirely too low as to be evidence of an unconscionable bargain which was altogether unfit to be made.¹ In 1734, on a bill to be relieved from an assignment of a legacy, it appeared that Andrew Mackean had, by his will, given a legacy of 500*l.* to his nephew Martin, if he should survive the testator's wife, Catharine, who, by the will was to have the interest of the 500*l.* for her life, as also the principal in case she should survive Martin. The nephew Martin was about twenty-four years of age; had led an extravagant life, and had been sometime in Newgate. The widow Catharine was about sixty-four years old; but as to her health, there was a variety of evidence. Martin sold his interest in this legacy of 500*l.* to Cole; for which Cole stipulated to give 100*l.*, to be paid in 5*l.* per annum, with a proviso, that if Martin survived the widow, then what should remain due of the 100*l.* should be paid to him within a year after her death; but if he died in her lifetime, then the 5*l.* per annum to continue payable until the 100*l.* should be fully paid. The price thus stipulated to be paid for this legacy, was held to be so much below its real value, that the assignment of it would have been set aside as unreasonable, had it not been solemnly and repeatedly confirmed by Martin.²

12. It is not unlawful for a remainder-man or a reversioner to sell his estate. Such sales are only set aside because of some fraudulent conduct in the purchaser, or because of his having taken some undue advantage of the seller of such an interest. Among other circumstances, inadequacy of price may, in all such cases, be taken into consideration as evidence of fraud. But inadequacy of price can only be shown by making an estimate of the then value of the life estate, and deducting that value from the then price of the inheritance, or the absolute or renewable estate. Some such proportional valuation must have been made in each of these cases, as well as in those which relate to the discharge of mortgages or other incumbrances; yet there is nothing to be found in the reports of any of them, nor in the reports of those which involve the apportionment of incumbrances, nor in those which relate to the abatement of specific legacies or to the adjustment of the amount for which an annuitant is to be admitted as a creditor against the estate

¹ *Twistleton v. Griffith*, 1 P. Wms. 310.

² *Cole v. Gibbons*, 3 P. Wms. 290.

of a bankrupt or insolvent, before the year 1750, which alludes to any positive rule of apportionment, or that indicates the principles by which the court was governed in putting a present value upon a life interest of any sort, or of apportioning any burthen between such an estate and a remainder or reversion dependent upon it.¹

English tables of the expectation of life.

13. Doctor Edmund Halley, an eminent mathematician of England, appears to have been the first who undertook to explain the doctrine of chances in relation to the probable duration of human life. About the year 1690, he published his "Essay on the Determination of the Degrees of Mortality," in order to adjust the valuation of annuities on lives, founded, as he informs us, upon a table of observations of the births and deaths in the city of Breslaw in Silesia.² Soon after, the "Observations on Chronology," involving similar considerations as to the duration of human life, were published by Sir Isaac Newton.³ In the year 1746, M. Deparcieux published his "Observations on the Rate of Mortality" as it occurred among the nominees of two tontines in France, from 1695 to 1740; and on great numbers of monks and nuns in France who died in the century preceding.⁴ Subsequently to which, Abraham de Moivre, then of England, published his "Essays on the Doctrine of Chances, and on Annuities." And it is said, that towards the close of his life, which happened in 1754, he was consulted on all questions relating to chances, gaming, and annuities, and by his answers chiefly subsisted.⁵ In the year 1740, Thomas Simpson, an eminent English mathematician, published a "Treatise on the Nature and Laws of Chance;" soon after which he published a small volume on the "Doctrine of Annuities and Reversions, deduced from general and evident principles, with useful tables showing the value of single and joint lives." And in the year 1752, appeared his work entitled "Select Exercises for young proficients in Mathematics."⁶ In the year 1771, Doctor Richard Price, an

¹ Ryle v. Brown, 6 Exch. R. 265; Darley v. Singleton, 6 Exch. R. 426; Williams' case, 3 Bland, Ch. 222-227.

² Rees' Cyclo. tit. Halley.

³ Ibid. tit. Newton; 1 Niebuhr's Rome, 285; 16 Westm. Rev. 328.

⁴ Finlaison's Report, 8; 2 Price, Obser. 454.

⁵ Rees' Cyclo. tit. De Moivre; 9 Westm. Rev. 421. ⁶ Rees' Cyclo. tit. Simpson.

eminent Englishman, published his celebrated work in relation to this matter, entitled, "Observations on Reversionary Payments," &c., the seventh edition of which, enlarged and improved by William Morgan, was published in 1812.¹ The public attention, in Great Britain, had not only been thus repeatedly called to this subject, by the publications of these eminent men; but a very great importance had been given to it by the formation, or legal incorporation, from the year 1706 to 1765, of many societies and bodies politic, for the granting of annuities and insurance upon lives;² and still more so, by the government's undertaking, in 1692, and continuing thereafter to raise revenue by the sale of annuities for life and for years.³ And the governmental interest in the matter was afterwards taken up in the House of Commons, and investigated with great care.⁴

14. The tables of Doctor Halley were calculated from observations made some time prior to the year 1679, at Breslaw, in Lower Silesia. But these tables have been pronounced so imperfect as to be wholly unfit for use;⁵ thus leaving to that gentleman no other merit in this respect, than that of having been the first to show the use of such tables, and how they might be constructed from correct observations.⁶ The next tables are those which may be called the London tables,⁷ formed by Mr. Simpson from the bills of mortality for London for ten years, from 1759 to 1768; and as these gave the value of lives among a body of people taken in the gross, in one of the worst of all situations, they are by no means fit for common use; and are therefore now never resorted to as a means of ascertaining the value of a life even in London itself.⁸

15. The next tables are those formed by Dr. Price from bills of mortality kept in the parish of All Saints in the town of North-

¹ Since that time, Arthur Morgan, in the year 1834, published a set of "Tables showing the total number of persons assured in the Equitable Society (London) from its commencement in September, 1762, to January, 1829," &c.

² 1 Price, *Obser.* 72, 97, 104, 109, 119, 142, 158; 9 *Westm. Rev.* 389.

³ 4 *W. & M. ch.* 3, § 18; 5 *W. & M. ch.* 5 and 20; 1 *Anne, Stat.* 2, ch. 5.

⁴ The report from the select committee on life annuities, 4 June, 1829; the report of John Finlaison, actuary of the national debt, on the evidence and elementary facts on which the tables of life annuities, constructed by him, are founded; Williams' case, 3 *Bland, Ch.* 227, 228.

⁵ Williams' case, 3 *Bland, Ch.* 232.

⁶ Rees' *Cyclo. tit.* Life Annuities and Mortality.

⁷ Appendix, A.

⁸ 1 Price, *Obser.* 211; Rees' *Cyclo. tit.* Life Annuities and Mortality.

ampton in England, during the years 1735 to 1780.¹ Northampton stands on a high region in the midst of England. It is situated on the river Nen, and is chiefly built on the slope, and near the top of a hill, and is generally clean and pleasant. The parish of All Saints embraces about half the population of the town.² The next table is that which has been formed for Carlisle,³ one of the most northerly towns of England. The situation of Carlisle is extremely beautiful; it stands on gently rising ground in the midst of extensive and fertile meadows, terminated by distant mountains, and watered by the Eden, the Caldew, and the Peteril. The two former of these rivers flow on different sides of the city; and their banks and contiguous meadows afford a number of pleasant walks to the inhabitants. The degree of salubrity of these two places, Northampton and Carlisle, and the diseases arising from the climate, with which they are visited, may be considered as sufficiently indicated by this brief description of their situation. But it is not stated whether the population was stationary or not at those places when those tables were formed; and yet it is evident that the migrations or shiftings of the population must necessarily affect all observations of the duration of life made from accounts of births and deaths alone.⁴ The Carlisle tables were formed from the results of observations made during the years 1779 to 1780, upon a population of eight thousand persons in that place. But it does not appear whether the parish of All Saints in Northampton was inhabited exclusively or disproportionably by rich, or by poor; nor is it said of what class the eight thousand persons of Carlisle was composed. Both of these last mentioned tables are evidently formed upon too narrow a basis to be applied to all England; and are the result of observations confined to too short a period of time, and are made without any discrimination whatever, as to class, occupation, or sex. The Northampton tables, however, have been adopted by many of the insurance offices in England, in cases of insurance for lives.

16. The Equitable Insurance Company of London has been regarded as the most wealthy and extensive institution of the kind in Europe. This company, from their own observations and experience, formed tables, such as they deemed safe to follow, with a

¹ Appendix, A.

² 2 Price, Obser. 94.

³ Appendix, A.

⁴ Rees' Cyclo. tit. Mortality.

view to profit. These tables, called the Equitable Tables, have been often resorted to as guides, and have been from time to time revised by the actuaries of the institution.¹ The next set of tables is that of Sweden, which appears to have been constructed in a very satisfactory manner, upon returns carefully collected in the years 1755 to 1776, and corrected from other returns from the years 1775 to 1796, and from 1801 to 1805, from the population of the whole of Sweden and Finland.² These tables may be trusted as accurately exhibiting the chances of mortality among the whole population of those two countries, but not the relative chances among the different classes of that population. But the climate of those countries, the severe and fatal changes of the seasons, and other peculiarities, influencing health and longevity, differ so greatly from those of most other countries, as to render this set of tables, unaided by other evidence, insufficient for the determination of the exact average mortality among the population of other and different regions.³

17. Another set of European tables was constructed about the year 1825, by John Finlaison, the actuary of the National Debt Office of England.⁴ These tables were deduced from observations upon the life annuitants of the English government, composed of all classes dispersed over all England, and amounting to nearly twenty-five thousand people, during a period of more than thirty years. But against these tables it may be objected, as against those of Sweden, that they appear to be based upon a view of the population of the whole country, without distinction as to particular places of habitation, or any discrimination as to the people, other than the duration of life of each sex; and also, that those State annuitants may be regarded as a selection of the best lives from the common mass.⁵ Nevertheless, these tables of Finlaison's, are now considered by many as the most comprehensive, accurate, and generally trustworthy tables extant for England.⁶

Difference between the expectation of life and the probabilities of life.

18. It should be recollected, that in the language of mathema-

¹ 9 Westm. Rev. 393. See Appendix, A.

² Appendix, A.

³ 1 Malth. Popu. b. 2, c. 2; 9 Westm. Rev. 386.

⁴ Appendix, A.

⁵ 2 Price, Obser. 454.

⁶ 9 Westm. Rev. 398, 403; Williams' case, 3 Bland, Ch. 232-235.

ticians who treat of this matter, the *probabilities* of life and the *expectation* of life, are different. By the *probabilities* of life, is meant the likelihood that all who are born in any particular place or country, or that of any given number born, so many will be found alive at any given age; as, for example, according to Dr. Halley's tables, out of one thousand persons born, only five hundred and ninety-eight will live to reach the twentieth year of their age; but according to the London tables, of the same number born, three hundred and sixty will reach that age; thus exhibiting a view of the waste of life from birth to that age. By the *expectation* of life, is meant that particular number of years which a life of a given age has an equal chance of enjoying; or the time that such person may reasonably expect to live. Tables showing the expectation of life are formed from those showing the probabilities of life.¹

Cases in England after the construction of mathematical tables.

19. A case determined, after much deliberation, about the year 1750, appears to have been the first in which any allusion was made in the courts of Westminster Hall, to the mode adopted by mathematicians for ascertaining the present value of a life interest of any kind;² which mode, however, after that time, seems to have been well understood; and has been often referred to in those courts.³ It would seem, that so early as 1759, the arbitrary rule of considering an estate for life in land, as equivalent in value to one-third of the whole, was not implicitly followed.⁴ In 1785, the rule was put aside as unjust; and each interest directed to be valued according to its actual worth, and in due proportion.⁵ In the year 1787, it appears that among other kinds of evidence, tables showing the expectation of life, were resorted to as a means of ascertaining the value of a life interest;⁶ and it was declared, that the division which the court had formerly made of a burthen upon the whole, of one-third to the tenant for life, had been found to be arithmetically wrong, though the principle that it should be borne in proportion, was right.⁷ In the year 1798, this matter having been again sub-

¹ 2 Price, Obser. 4, 251, 254, 290, 297; Williams' case, 3 Bland, Ch. 237.

² Chesterfield v. Janssen, 2 Ves. Sr. 127. ³ Nichols v. Gould, 2 Ves. Sr. 423.

⁴ Lawrence v. Maggs, 1 Eden, 453; Pickering v. Vowles, 1 Bro. C. C. 198.

⁵ Nightingale v. Lawson, 1 Bro. C. C. 440; s. c. 1 Cox, 181.

⁶ Heathcote v. Paignon, 2 Bro. C. C. 167; Griffith v. Spratley, 1 Cox, 389.

⁷ Stone v. Theed, 2 Bro. C. C. 243.

mitted for consideration, the old rule was entirely exploded; and it was declared, that the doctrine of charging one-third upon the tenant for life could not hold, and was not to be applied in any case. That it was a most unreasonable and absurd rule; for, it being admitted that every person should contribute according to his interest, a man of the age of eighty, with, perhaps, not a year to live, must be said to have as much interest as one of twenty.¹

20. The matter, it is said, had, in some of the cases determined prior to the year 1804, been very anxiously, frequently, and gravely considered, although it does not appear from the reports of them, because of the intricacy of the subject, and of its not being easy to follow a discussion upon so difficult a question in which great nicety of fact and calculation were involved. And it was then finally laid down, as a general rule in all cases, where a present value was to be put upon an annuity for life, or any other life interest in property, as well as where a burthen was to be borne by a particular tenant and a remainder-man or reversioner, that the estimate must be made with reference to the then actual nature of the life; and, that an apportionment of the burthen must be adjusted between the several holders of the estate, so that, if the particular tenant was bound to pay in any degree, he was made to pay in proportion to the benefit he in fact took under the transaction; and that the remainder-man, or reversioner, was made to pay with reference to his proportion of the benefit; which estimate and adjustment must be made upon facts, and not upon mere speculation.²

Expectation of life in the United States as compared with that in Europe.

21. From such information as we possess, it may be confidently assumed, that the average rate of mortality is, in general, not greater in this country than in any part of Europe; and that taking into consideration all political and natural causes, as compared with England, in this respect the most favored portion of Europe,³ the circumstances of the United States are, in general, fully as

¹ White v. White, 4 Ves. Jr. 24; Penrhyn v. Hughes, 5 Ves. Jr. 107.

² White v. White, 9 Ves. Jr. 554; Allan v. Backhouse, 2 Ves. & Bea. 78; Williams' case, 3 Bland, Ch. 240, 241.

³ 2 South. Rev. 153; 1 Malthus, Popu. 477.

favorable to the duration of human life as in any other country of the world. For, after making the largest allowance for accessions to our number by emigration,¹ and for the greater number of marriages here than elsewhere, it will be found, that in no country has the population increased so rapidly as in the United States. Marriages, although earlier and more numerous, are, on an average, not much more fruitful here than in other countries.² And the general ultimate term of human existence, although extended here as far as anywhere, not having been materially enlarged, the rapid increase of our population can only, therefore, be accounted for by admitting it to be a fact, that of those born here, a greater proportion approximate to the ultimate term of life than in any other country; or, in other words, that the rapid duplication of our population is more owing to a diminished mortality than to an increased number of births, or to any accessions from emigration.³ This, however, is only a general conclusion deducible from the several enumerations of the inhabitants of the whole Union, which might not be alike applicable to every State or even to any larger division of the confederacy. But it is a general conclusion which will be found to be mainly corroborated by a comparison of some of the principal causes affecting human life here, with those of a similar nature in other countries. Among citizens, our government admits of no political distinctions; there are no aristocratic or religious classes hanging as a dead weight upon the rest of the community. There being fewer drones, and a larger proportion of active producers, the necessities and comforts of life are more abundant, and more generally and equally diffused here than in any of the European nations. In addition to which, the soil of our country being more fertile, and a greater proportion of it fit for cultivation, than that of Europe, the means of subsistence may be obtained here in larger measure and with less labor than there; insomuch so, that no one has yet ventured to predict when our population will be so numerous as to have its further increase checked by the want of food.⁴

¹ Seybert, Stat. Ann. 28, 30.

² 2 Sparks' Franklin's Works, 313; 2 Price, Obser. 42; 2 Malthus, Popu. b. 2, c. 9; 9 Westm. Rev. 419.

³ 2 Price, Obser. 51; 1 Malthus, Popu. 386.

⁴ Darby's View U. States, 434; Seybert's Stat. Ann. 51, 52; 2 Sparks' Franklin's Works, 311; 2 Malthus, Popu. 53; Williams' case, 3 Bland, Ch. 247, 248.

Difficulties in forming tables of the expectation of life in the United States.

22. However desirable it may be to obtain correctly formed tables of the expectation of life in the United States, as a means of estimating the value of life interests in property, yet, from the continual oscillations of our population, it must be exceedingly difficult to make any correct observations as to the average rate of mortality in any of the States of our Union.¹ The two strong ties, poverty and wealth, which prevent migrations, have been often broken by the oppressions of government in the old world; but in our country, the universal parental care of the government and the equal distribution of property, lifting all above want, and dispersing, at short intervals, the great accumulations of wealth, leave it in the power of all to remove at pleasure; so that the peculiar temptations of advantage offered by the various regions of our country cause continual and most extraordinary shiftings of our population. It is admitted, as regards even the comparatively stationary circumstances of the cities of Europe, that a large allowance must be made for the adult population annually poured into them from the country.² But, as to the cities of this Union, the annual accession of some of them from the country has been so great as to confound all calculation.³

23. The making of observations as to the expectation of human life here, however, is not only rendered difficult by the extraordinary shifting of our population, but those difficulties are much increased by the changes continually going on in the salubrity of many situations in our country. "The territory of Maryland," says Chancellor Bland,⁴ "when the first settlers seated themselves upon it, was everywhere covered by a thick and lofty forest, and drained by innumerable rivulets, creeks, and rivers, all pouring into the great Chesapeake. A territory so shaded, and so netted with humid valleys and watercourses, many of them descending from rugged and elevated mountains, under a climate ranging from such high degrees of heat in summer to such low degrees of cold

¹ 1 Malthus, Popu. 22.

² 1 Malthus, Popu. 468.

³ Seybert, Stat. Ann. 48; 2 Price, Obser. Essay 2; Williams' case, 3 Bland, Ch. 248, 249.

⁴ In Williams' case, 3 Bland, Ch. 250. See, also, observations of Ruffin, C. J., in *Atkins v. Kron*, 8 Ired. Eq. 1.

in winter, it is evident, must have been, in its primitive state, productive of causes affecting human life differing materially in malignity from those which had been found to arise over any equal space of Europe. But the active civilized people who took possession of Maryland, as they increased in numbers and advanced, felled large spaces of the forest, and laid bare, drained, and cultivated the soil. These operations, by changing the state of things, may have produced some changes in the climate; and have, no doubt, been attended by some ameliorations in the salubrity of the country, which, it is more than probable, will continue to go on until our population becomes as dense as that of the best portions of Europe."¹

Mathematical tables constructed in the United States.

24. In consequence of the difficulties above suggested, but few tables of the expectation of life have been calculated from observations made in this country. Among those which have been formed may be named Dr. Wigglesworth's tables, founded on observations made in New England;² and tables constructed from results furnished by the records of the Episcopal Church and of the Board of Health of the city of Philadelphia.³ A writer in the Southern Review has intimated that he had, for some years, been endeavoring to collect data upon which to found a calculation of the average duration of life in the Southern Atlantic States, comprising Georgia, the Carolinas, and Virginia.⁴ But it would seem that the principal materials which have, as yet, been collected, likely to afford aid in the formation of such a table, are the few and imperfect bills of mortality kept in some of the cities;⁵ the reports of the surgeons of the army as to the health of the troops at the places where detachments of them have been stationed; the pension list, and the census of the Union.⁶ Indeed, the doctrine of chances, in relation to the expectation of human life, as a means of ascertaining the present value of life interests, does not appear to have been

¹ Darby's View, U. S. 421, 427; Hume's Essays, Of the Populousness of Ancient Nations; Taylor's Arator, Number 51, Draining.

² Memoirs of the American Academy of Arts and Sciences, vol. ii., p. 131; Eastbrook v. Hapgood, 10 Mass. 313, 315, note; Appendix, B.

³ Seybert, Stat. Ann. 51; Trans. Philo. Soc. Philada., vol. iii., No. 7, p. 25; 2 Malth. Popu. 16; Appendix, A.

⁴ 2 South. Rev. 175.

⁵ Seybert's Stat. Ann. 49.

⁶ Williams' case, 3 Bland, Ch. 246.

in any way noticed in our laws until after the Declaration of Independence. In several of the States, companies have been incorporated, with power to grant life annuities, and to make assurances of lives; which, on the part of such companies particularly, must necessarily involve a careful consideration of what may be deemed the expectation of human life at various ages. But little is to be found, however, in the judicial proceedings in our country in relation to this matter.¹

Extent to which mathematical tables may be relied upon in estimating the probable duration of life.

25. It has been said by an accomplished mathematician, that "the basis of all questions having reference to the failure or continuance of life, is well known to be the law of mortality, or the probability that a human being, who may be in any given year of age, will die in that same year. If this be accurately determined for each and every single year in the natural life of mankind, all other questions whatever, of a financial nature, are capable of precise solution, being merely so many arithmetical results. The said probability, however, can only be arrived at through the experience of what has already happened to a great number of other human beings, all in the very same circumstances with the person whose case is under consideration."²

26. It is to be remarked, however, that there are few situations as to which any observations have been made, from which tables have been formed; and yet, without any allowance for differences, those few tables have been used as if they were alike applicable to all times and circumstances. This is a great error. Such tables, as regards other situations, can only be used by way of analogy, and can be relied on, in so far only as it can be shown by advertising to all the causes which materially affect human life, that the situation to which the tables are proposed to be applied for information is altogether, or very nearly similar to that for which they were made. Tables showing the expectation of life at different ages over the whole of Sweden, for instance, could not be followed as safe guides for ascertaining the expectation of life, at the same ages, over the whole of Hindostan. And so, too, it would be improper to take the tables of expectation formed for the city of

¹ Williams' case, 3 Bland, Ch. 252. ² Finlaison's Report, 1. See ante, § 13.

London as rules for ascertaining the expectation of life in Wales. The causes materially affecting the duration of human life, at the time and place for which a table has been made, must, therefore, be understood and compared with those of the place where the life in question exists, before such allowance can be made for the difference, should there be any, as will warrant the use of such table as a means of ascertaining the value of each life.¹

27. In considering this subject, in a case before them, the Maryland Court of Appeals said: "The chancellor, in his decree, has adopted the value which was ascertained by the auditor by reference to Dr. Halley's table of observations, which has been used in England for the purpose of ascertaining the value of life annuities and reversionary interests. These tables are framed upon long and accurate observations on the bills of mortality in England, and in other places; and may not be an unsafe guide for the purpose in the region or latitude for which they were calculated.² But the probability of the duration of human life can not be the same in every latitude and climate. In the one, it may be prolonged to the greatest age; in the other, abbreviated to what, in a more healthy region, would be considered as but a middle age; and even, indeed, in the same district of country, the chance for the duration of life is by no means the same. Thus, would tables suited for the lowlands of Louisiana furnish any index of the duration of human life in the highlands of Maryland? And, even in our own State, could any dependence be placed in the calculation of the value of an annuity, or of a reversion expectant upon a life, which would say, that as great a probability existed for the duration of human life amid the marshes of the Chesapeake Bay as in the mountains of Allegheny? These observations will be found to be verified by an examination of Dr. Halley's tables, as suited to different parts of England, and to places on the continent. Whether these tables, upon which the chancellor's decree is founded, are suitable to this State, could only be told by a long series of observations here, which not having been made, we conceive it would be unsafe to adopt them."³

28. "In all our inquiries for this purpose," remarks Chancellor

¹ Williams' case, 3 Bland, Ch. 232.

² See ante, §§ 13, 14.

³ Maryland Court of Appeals, in *Dorsey v. Smith*, 7 Har. & J. 366. See post, §§ 42, 47.

Bland, in a subsequent case,¹ "it should be borne in mind, however, that it appears from observations everywhere, that there is an ultimate term beyond which human life can not be extended; that the days of our years are threescore years and ten, and if by reason of strength they be fourscore years, yet is their strength labor and sorrow."² And that the extreme term of existence is not surpassed, because a greater number, under some favorable circumstances, approach it. The boundary seems to have remained impassable since the days of Eli the priest, a period of at least three thousand years, who was ninety and eight years old, and his eyes were dim that he could not see; and he died, for he was an old man and heavy, and had judged Israel forty years.³ Neither does it appear that the ordinary events of forming connections in marriage, and rearing families at the usual periods of life, have at all varied within the same length of time.⁴ It must also be recollected, that it has been observed everywhere and at all times, that although more males than females are born;⁵ yet, from birth⁶ to old age, through every period of life, even that which is most perilous to females, the time of child-bearing,⁷ the expectation of life is greater in favor of females than of males.⁸ There is, however, some reason to believe, that although an unquestionable state of celibacy, as that of the condition of nuns in a convent, has no effect in shortening female life before fifty; yet that after that age, the mortality among them becomes more severe.⁹ So that it must be regarded as an established truth, and a general rule, that there is something in the physical constitution of males more frail and delicate than in that of females; or that, in general, there is a greater degree of tenacity of life in females than in males.¹⁰ And it must likewise be borne in mind, that in fixing a general rule, or adjusting a table of the duration of human life, so far as any judicial inquiry is concerned, the object is not to lay down a rule which may be safely or profitably followed by an insurance company, but

¹ In Williams' case, 3 Bland, Ch. 229-231.

² Psalms, xc. 10; 2 Samuel, xix. 32.

³ 1 Samuel, iv. 15-18.

⁴ Finlaison's Report, 18; 2 Malth. Popu. b. 3, ch. 1, pt. 86; Reply to Malth. 247.

⁵ 2 Price, Obser. 105, 127, 128.

⁶ Ibid., 106, 131.

⁷ Ibid., 408, 442.

⁸ 1 Price, Obser. 8, 89, 95, 129, 136, 233; 2 Price, Obser. 43; Rees, Cyclo. tit. Marriage and Mortality; 9 Westm. Rev. 397, 398; Seybert's Stat. Ann. 44; 2 South. Rev. 177.

⁹ Finlaison's Rep. 8; 2 Price, Obser. 132.

¹⁰ 2 Price, Obser. 111, 230.

to establish the truth, which involves nothing more than a consideration of those facts in relation to the actual continuance of human life in the place where the specified life exists, so as to calculate from them a proper average as to its reasonably expected duration.

29. "It seems to be generally admitted," the chancellor continues, "that marriages are not more fruitful now than in past ages, and in stages of society having much less of the comforts, or even of the necessities of life, than at present; that the poor bring forth more children than the rich, but preserve fewer;¹ and yet that the population increases much more rapidly in modern than in ancient times.² These facts only show, however, that the present is more friendly to human life than the past state of society; and that the probability, as well as the average duration, or mean term of life, as people advance from a savage to a highly civilized state of society, have improved, with their improved habits and condition; which has certainly been the case in England, and much more so in France, since the revolution in that country.³ The duration of the lives of those who come into existence, is not only very materially affected by the greater abundance of the means of subsistence with the increase and variety of comforts to be had, in a generally improved state of society, but also by the climate and salubrity of the country or situation in which such lives happen to be placed, as well as the political causes, such as the arbitrary nature of the government, or the grade of society under which they may be cast.⁴ It has been observed, from a very remote period, that the high and mountainous regions of Germany, have always been much more healthy than the low margins of its great rivers and sea coasts;⁵ and indeed over the whole world the degree of salubrity often varies with a mile of difference in location. It is universally admitted that large cities are less favorable to the duration of human life than country situations; insomuch so, that great cities have been justly termed 'the sepulchres of the dead and the hospitals of the living.' The difference between the duration of human life in all cities of such magnitude as London, Paris, Vienna, Berlin, and the country, has always, and at all times, been very great. But this difference lessens with the smaller towns;

¹ 9 Westm. Rev. 413.

² 2 South. Rev. 178; 9 Westm. Rev. 402.

³ 1 Malth. Popu. 52, 385, 401, 413; 1 Price, Obser. 182, 186; 9 Westm. Rev. 388, 395, 398, 399; 2 South Rev. 175.

⁴ 2 South. Rev. 186.

⁵ 1 Malth. Popu. 380; 2 Price, Obser. 242.

so that, as between mere villages and the country, it is nothing at all."¹

30. The expectation of life varies not only with country and place, but also according to the grade and condition of individuals in society; and such variations are most remarkable in those countries in which the grades and conditions are most strongly distinguished. In England, as well as in all the other countries of the old world, the expectation of life is greatest in favor of those of the middle classes, and least favorable to those of the aristocratic orders, whose lives are curtailed by their intemperance and debaucheries;² and to those of the mere operatives, whose lives are shortened by the oppressions and privations under which they suffer.³ Consequently, a table formed for a whole country collectively, can not be altogether correct for every particular situation, or for each class of society of the same country.

31. In the inquiries which have been made concerning the duration of human life, much has been said as to the insalubrity of particular situations; as to the causes, prevalence, and cure of diseases; and also as to the political causes which materially affect the continuance of human life; but with all, or any of those causes, or with the prevention, or removal of any of them, a court of justice, when called upon merely to determine the present value of a life estate, can have no concern, further than may be necessary to enable it to derive information by analogy.⁴

32. In estimating the value of estates for life, and in making an apportionment among the several owners of real estate, it appears that the English courts have latterly, in almost all cases, sought assistance from the tables formed by mathematicians of the expectation of life in that country, without receiving them, except, perhaps, in the case of the distribution of the assets of a deceased person's estate,⁵ as in any respect conclusive.⁶ Because, as a basis for

¹ 1 Price, Obser. 127; 2 Price, Obser. 30, 33, 45, 49, 65, 83, 127, 218, 226; 1 Malth. Popu. 392; 2 Malth. Popu. 487.

² 9 Westm. Rev. 388.

³ Ibid.; 14 Westm. Rev. 390, note; 1 Price, Obser. 150; 2 Price, Obser. 144; 3 Lond. & Westm. Rev. art. 8; 2 Sparks' Franklin's Works, 324.

⁴ Williams' case, 3 Bland, Ch. 231-2.

⁵ *Ex parte* Thistlewood, 19 Ves. Jr. 250.

⁶ *Heathcote v. Paignon*, 2 Bro. C. C. 167; *Griffith v. Spratley*, 1 Cox, 389; *Evans v. Cheshire*, Belt's Supp. to Ves. 306; *Gowland v. De Faria*, 17 Ves. Jr. 25; *Ex parte* Thistlewood, 19 Ves. Jr. 236; *Ex parte* Whitehead, 1 Meriv. 127; *Davis v.*

all those tables a certain average rate of mortality being established or assumed, they are then the result of calculations upon mere age, taking all lives of the same age to be of equal value, considering none as bad that are ordinarily good. But the constitutions of individuals differ essentially; the health of the same individual may have been materially affected by accident or climate; or he may have a latent disease which has, in a greater or less degree, affected his duration of life for many years. All such circumstances must be taken into consideration; and, therefore, no ordinary table of the expectation of life, although it may afford much useful information, can alone be taken as giving a correct general rule for estimating the value of the life of any particular individual.¹

Method in Europe of ascertaining the fee simple value from the rental value.

33. In England, and indeed, as it would seem, all over Europe, for a great length of time past, the most usual, or perhaps the only method of coming at the fee simple value, has been, first to ascertain the fair rental value or price by the year; and to multiply that by the number of years' purchase which the existing demand for land will bear in the given situation at the time. The ratio between the rental and the sale value of land, in England, varies from twenty to forty years; that is, a parcel of land the fair rental value of which is one hundred pounds, is worth, in common cases, from two thousand to four thousand pounds. In England, a very large proportion of the lands are rented out by the fee simple owners; and therefore it may not be difficult there, in this mode, to make an estimate of the fee simple value of any estate; either from the rent of itself; or, by analogy, from the rent of other similar estates in its immediate vicinity. But in this country, more than nine-tenths of the actual occupants and cultivators are also the owners of the fee simple; and hence resort can not be so readily had here as in England, to the rental for the purpose of computing the fee

Marlborough, 2 Swanst. 147; Portmore v. Taylor, 6 Cond. Ch. R. 104; Newton v. Hunt, 7 Cond. Ch. R. 518; Wardle v. Carter, 10 Cond. Ch. R. 163; Ryle v. Brown, 6 Exch. R. 265.

¹ Gwynne v. Heaton, 1 Bro. C. C. 2; Heathcote v. Paignon, 2 Bro. C. C. 167; Gibson v. Jeyes, 6 Ves. Jr. 274; *Ex parte* Thistlewood, 19 Ves. Jr. 236; Williams' case, 3 Bland, Ch. 241.

simple value. But with us, as in England, it appears, that so far as the rents or annual price can be ascertained, the ratio between the rental and the sale value ranges very wide; perhaps from fifteen to thirty-five years' purchase.¹

Sale of the fee determines nothing as to the proportion between the particular estate and the reversion.

34. It has been sometimes said, that where the value of the fee simple has been properly ascertained, that of any inferior holding may be readily found from it by means of the general rules of calculation. If that were so, there could be no difficulty in any case, where the value of the whole had been ascertained by an actual sale, to ascertain by calculation, the value of any particular estate which had been carved out of it. But strictly, a sale of the whole determines nothing as to the proportion between the particular estate and the reversion or remainder; and therefore, that proportion is left to be ascertained just as if no such sale had been made. In such cases, the particular estate is, like the fee simple, to be valued by a computation of so many years' purchase. A lease for a long term of years at a small rent, may reduce the value of the remainder to very little; but a lease, at a nominal rent, for ninety-nine years, renewable for ever, would, in effect, annihilate the fee simple.²

Cases in the American courts.

35. In Maryland, in the beginning of the year 1800, the then existing law regulating the descent of real estate, was so modified as to declare, that in case of a sale of the lands of an intestate for the purpose of effecting a division of its value among the heirs, there should be awarded to the widow, according to her age, health, and condition, not more than a seventh nor less than a tenth of the net amount of sales, in lieu of dower;³ which rule was afterwards embodied in the general Act directing the course of descents of intestates' real estates.⁴ The same range of allowance to the widow, according to her age, health, and condition, was declared to be the rule where lands were sold for the benefit of infants;⁵ as well as

¹ Williams' case, 3 Bland, Ch. 278. ² Williams' case, 3 Bland, Ch. 279, 280.

³ 1799, ch. 49, § 6.

⁴ 1820, ch. 191, § 28.

⁵ 1816, ch. 154, § 10.

in those cases where the court was authorized to sell the realty in order to save the personalty.¹ It would seem necessarily to follow, that a similar rule and limited range of discretion should have been laid down for fixing the value of a life interest in the whole estate, as well as in one-third of it only. But, in amending the Act to direct descents, so as to provide for allowing an equivalent value to tenants by the curtesy, and to tenants for life, claiming by deed or devise, it was declared, that there should be awarded to such tenants for life such proportion of the purchase-money as the court, upon consideration of the age, health, and condition of the tenant for life, should think just and equitable, in lieu of such life estate; thus investing the courts with a range of discretion entirely unlimited.² And these amendments were engrafted into the general Act to direct descents without any material alteration.³

36. There is nothing in any of these enactments which shows, that in estimating the value of a life interest in land, any separation or distinction was directed to be made between that portion of the purchase-money of the whole which should be regarded as the price of the life interest only, and that which was to be considered as the price of the remainder or reversion. But such a distinction does not seem to have been altogether lost sight of in all the laws in relation to the matter; for it is declared, that upon a sale of a *reversion* belonging to an infant, with the assent of the tenant for life, the court shall order the annual interest, or *such part thereof* as may be deemed equitable, to be paid over to such tenant for life during his life.⁴ Apart from these legislative enactments in relation to these specified estates for life in land; and as regards all other life interests in land, annuities for life, &c., the courts were left, without any positive or general rule as their guide, to adjust the value of life interests according to the general principles of law and justice.

37. There can be no doubt, that long antecedent to the amendment in 1800, of the Act to direct descents, there must have been brought before the Maryland courts, many cases in which it was

¹ 1818, ch. 193, § 8; 1819, ch. 143. The same provisions, substantially, are still in force. 1 Md. Code, p. 77, § 32; p. 342, § 63.

² 1809, ch. 160, § 4; 1810, ch. 25, § 2; 1811, ch. 200, § 2; 1812, ch. 181, § 1.

³ 1820, ch. 191, §§ 35-38.

⁴ 1816, ch. 154, § 13, which Act has been explained and extended to *remainders*, by 1831, ch. 311, § 9.

necessary to make a valuation of a life interest ; but no such case has been reported. In a case brought before the court of chancery in 1801, by a widow, to obtain an allowance of a proportion of the proceeds of a sale as a compensation for her dower, the chancellor alluded to it as the first of the kind within his recollection. In adjusting the proportion of the proceeds of the sale to be allowed to her in that case, he declared, that as she could not use her third part of the land as tenant in fee simple,¹ she could not be entitled to one-third of the annual interest on the whole purchase-money ; but on consideration of all the circumstances, and without apparently adverting to the Act providing, that in cases arising under the statute to direct descents, the widow should be allowed not more than one-seventh nor less than a tenth of the proceeds of sale, he awarded to her three-twentieths of the net proceeds of sale.² Some time after which, this matter, as to the proper proportion of the proceeds of the sale of real estate which should be awarded to a widow in lieu of her dower therein, seems to have very strongly attracted the attention of Chancellor Hanson ; and, as it would seem, without the slightest reference to any then existing Act of Assembly, or to any previous decision of his own, he took up the subject on the 14th of September, 1803, with an avowed determination to establish a general rule by which the court should be governed in all future cases, when called upon to award to a widow an adequate compensation for her dower.

38. He said : “ Sometimes, when lands subject to dower, are sold under the authority of this court, the widow and the persons concerned, agree that the chancellor fix the value of the dower. There had prevailed an idea pretty generally, that the value of the dower of a middle aged woman was only one-eighth of the whole value of the land ; and parties sometimes, in this court, have agreed, that one-eighth of the net money arising from the sale should belong to the widow. The aforesaid idea is evidently borrowed from England, where the widow’s dower is estimated from the rents. For instance, land which would sell for 7500*l.* rents for only 300*l.* or four per cent. ; well, as the widow is entitled to one-third of the rent, viz. : to 100*l.* per annum for life, they calculate the present value of her

¹ *Maccubbin v. Cromwell*, 2 Har. & G. 457. In *Greenwood v. Clarke*, the widow was allowed one-eighth of the net proceeds of a sale of lands as a compensation for her dower. 3 Bland, Ch. 268, note.

² See ante, § 35.

annuity. If thirty years of age, or under, she has an equal chance of living twenty-four years; for this they set down twelve years certain, and then calculate the present value of an annuity of 100*l.* for twelve years. This they find about 937*l.* 10*s.* 0*d.*, calculating their rate of interest which is five per cent.; the said 937*l.* 10*s.* 0*d.* is just one-eighth part of 7500*l.*

39. "But surely the incontrovertible principle is this: as the widow is entitled to one-third of the land for life, when she consents that the land may be sold, she is entitled to the interest of one-third of the money for life. Suppose, then, the land sell for 3000*l.*; the interest is 180*l.*, one-third of which is 60*l.*; suppose her of such an age, that is, not exceeding thirty, as to have an equal chance of living twenty-four years; set down twelve years certain, and calculate the present value of an annuity for twelve years of 60*l.* per annum. I calculate at compound interest of six per cent., and the said value to be rather more than 500*l.*, which is one-sixth of the whole money, 3000*l.* Had I calculated at simple interest, the value would have been still less; but compound interest surely is right. You wish to know the present value of 100*l.* to be received twelve years hence; you find it to be 50*l.*, because 50*l.* at compound interest of six per cent. in twelve years amounts to 100*l.*, and even a little more. Calculate at simple interest, and the value of 100*l.* receivable twelve years hence, is 58*l.* 5*s.* 0*d.*; because 58*l.* 5*s.* 0*d.* at simple interest of six per cent. amounts, in twelve years, to about 100*l.* Suppose a man accustomed to let money at interest, he can lawfully exact only six per cent., and must not charge interest on interest. Who is there that can afford to let money at interest and dispose of his surplus money in no other way, that would not be willing to receive twelve years hence, the sum of 10,000*l.* for 5000*l.* now lent? It is evident that at simple interest, unless punctually paid and instantly let out, he can not, in twelve years, convert his 5000*l.* into 10,000*l.*; at mere simple interest it amounts to only 8600*l.*; because 300*l.* is the interest of 5000*l.*, and $300 \times 12 = 3600 + 5000 = 8600$.

40. "The chancellor has taken the trouble to demonstrate clearly, that young widows have not generally received near the value of their dower. It is plain to common sense, that the dower of an old woman can not be equal in value to that of a young one. To fix one value of all dowers, is therefore preposterous. The chancellor has, with great trouble, care, and attention, calculated, on

the principles here laid down, the value of dowers of women of different ages. It is certain, that the value of the dower of a healthy woman twenty years of age, who has an equal chance of living thirty, is more than that of a woman who has attained thirty years; however, the chancellor, under all circumstances, has thought proper to consider the dower of all women, not exceeding thirty years of age, to be no more than one-eighth of the net sum produced by the sale of lands; and he thinks proper to pass a general order agreeably to which, allowances for dower hereafter shall be made. A healthy widow, not exceeding thirty years, shall be allowed one-sixth of the net amount of sales; if above thirty and not exceeding thirty-seven, one-seventh; above thirty-seven, and not exceeding forty-five, one-eighth; above forty-five, and not exceeding fifty, one-ninth; above fifty, and not exceeding fifty-five, one-tenth; above fifty-five, and not exceeding sixty, one-eleventh; above sixty, and not exceeding sixty-five, one-twelfth; above sixty-five, and not exceeding seventy, one-sixteenth; after that age, all allowed one-twentieth."¹

41. Sometime afterwards, in the year 1804, the subject was again taken into consideration by Chancellor Hanson, when he thought proper to alter the graduation of the allowance to widows. "From the tables and calculations," he said, "taken from Simpson's Algebra, of the probable duration of life, it appears, that the value of a woman's dower is as follows: If under thirty years of age, one-sixth; above thirty, and under thirty-six, two-thirteenths; above thirty-five, and under forty, one-seventh; above forty, and under forty-five, two-fifteenths; above forty-six, and under fifty-one, one-eighth; above fifty-one and under fifty-six, one-ninth; above fifty-five and under sixty-one, one-tenth; above sixty, and under sixty-seven, one-twelfth; above sixty-six, and under seventy-two, one-fourteenth; above seventy-two, and under seventy-seven, one-eighteenth; and above seventy-seven, one-twentieth."²

42. Chancellor Bland, has the following observations upon the principles thus declared:³ "The manifest discordances of the rules which have been laid down, or adopted for the government of this

¹ See 3 Bland, Ch. 269, 270.

² See 3 Bland, Ch. 270-1. See, also, *Dorsey v. Smith*, 7 H. & J. 356, 366, where the rule of the court of chancery was followed and approved by the court of appeals.

³ In Williams' case, 3 Bland, Ch. 275, *et seq.*

court, in cases of this kind, require some further remarks. The legislative rule in regard to dower, which directs that, in certain specified cases, not more than one-seventh, nor less than a tenth, of the net proceeds of the sale of the whole estate, shall be awarded to the widow in lieu of her dower, fixes an arbitrary limitation, the reason of which is not apparent. As early marriages in our country are common, there must be many instances of young widows; and consequently, this legislative rule must embrace all cases of widowhood from fifteen to eighty years of age; with an expectation of life, according to Finlaison's tables, ranging from forty-seven to no more than six years; and yet, bound by this rule, the court can, on the one hand, award to the life of forty-seven years expectation, no more than a seventh; and on the other hand must give to the life of only six years expectation, not less than one-tenth of the whole net proceeds of sale. This rule thus appears from itself to be in many of its bearings, unreasonable and unjust.

43. "In all inquiries as to the present value of a life interest in real estate, it is indispensably necessary to bear in mind the distinction between the interest of the particular tenant, and that of him in remainder or reversion; and also to take especial care, that neither should have awarded to him anything which may properly be considered a part of the value of the estate which belongs to the other. Thus, supposing the whole estate were sold for \$9000; that sum would represent the entire value of the whole, including both interests, as well as that of the tenant in dower, who was entitled to no more than one-third for life; as that of him who was entitled to the fee simple of two-thirds, and of the reversion of the one-third; and consequently, if the widow were allowed \$3000, she would have awarded to her, in that one-third, a sum of money which must be considered as including the full price of the reversion; to no part of which could she be entitled. It is clear, therefore, that she should not, in any case, be allowed as much as one-third of the purchase-money of the whole estate. But, if one-third of the proceeds of sale were put out on interest, the interest which the whole third would so accumulate, would arise, not only from so much of it as represented the value of the widow's dower, but also from that which must be considered as the price of the reversion. Hence it would be as clearly wrong to give to a widow the whole of the interest arising from one-third of the proceeds of sale as to

award to her the one-third of the principal itself.¹ This reasoning, it is obvious, applies with no less force to the case of a tenant for life of the whole, as to the case of a tenant in dower. It would be in each case, directly or in effect, to take away a part of the property of the reversioner or remainder-man, and to give it to the particular tenant. But it may well be doubted, whether a court of justice has the constitutional power, in such a manner, to divest one person of his property, and transfer it to another. Yet, in making the calculation for the chancery rule, it was assumed, as we have seen, that the widow was entitled to the interest of one-third of the proceeds of sale for life. This, therefore, is the first element in which the chancery rule is radically wrong.

44. "It should also be recollected, in all cases of this kind, where it may be required, out of the purchase-money or value of the whole, to separate the value of the particular estate from that of the inheritance, that it is necessary, in the first place, to attend to the true legal extent of the particular estate. Tenants in dower, by the curtesy, &c., are not allowed to commit waste; that is, they can not cut and sell timber; open and work unopened mines, &c.; and being restrained from deriving any such profits from the estate, the value of it, in regard to all such profits, properly forms a part of the price of the reversion or remainder; and the value of such profits also represents that which is the difference in price between a particular estate the tenant of which is, and one the tenant of which is not, impeachable for waste.² But this distinction does not appear to have been at all attended to in making the calculations for the chancery rule. This, therefore, is another element in which it must be considered as materially erroneous.

45. "It appears that the present value of a widow's dower was calculated for the chancery rule at compound interest; because in England, the present value of such estates, it is said, is calculated upon the ground of compound interest. But then it is laid down in an English adjudication, that as the computation of compound

¹ The position here taken by the chancellor, does not seem to be well founded. It is unquestionably true, that the widow can not have one-third of the principal absolutely. But if the land be unsold she is entitled to the use of one-third of it during her life, subject, of course, to such restrictions in the mode of enjoyment, as appertain to tenants for life. When, therefore, the land is sold, she is entitled, in like manner, to the use of one-third of the proceeds for life; or at least to such proportion as will produce annually, in the form of interest, a sum equal to one-third of the annual net profits of the land.

² Ante, ch. xxiii., §§ 19, 20.

interest proceeds upon the idea that the interest is paid upon the exact day, and immediately laid out, which is impossible, it is sufficient to compute compound interest at four per cent., or at something less than the legal rate of interest.¹ The calculations for the chancery rule, have, however, been made upon the ground of compound interest at the full legal rate of six per cent.; which, if wrong in England, where there are so many ways of making immediate and safe investments of money, must be much more so here. This, therefore, is a third element in which that rule is substantially erroneous.

46. "It has been shown by reference to good authority, that the observations of the rate of mortality at Breslaw, from which Dr. Halley constructed his tables of the probability and of the expectation of human life, have been found to be so entirely inaccurate, that they have never, in any case, been resorted to for many years past.² And it has also, in like manner, been shown that the observations of the waste of life in London, from which Mr. Simpson formed his tables, were in so many respects erroneous, that they have been considered as very unsafe guides in calculating the value of human life even in London itself; and as totally unfit for use, in making an estimate of the value of life anywhere else.³ But it appears, that all the calculations for the chancery rule were taken from the observations of London, and the tables of Mr. Simpson, founded on those observations. This, therefore, is a fourth element in which that rule is essentially wrong.

47. "It is well known that in our country, early marriages are common; and it appears from the observations of Dr. Grenville, that even in England, of eight hundred and seventy-six females, thirty of them had been married at or before fifteen years of age. Therefore, as it may fairly be presumed that there must be a great number of instances of widows under thirty years of age; and as according to Finlaison's tables, the expectation of female life between fifteen and eighty years of age, ranges from forty-seven to six years, any graduation of allowance in lieu of dower, to be correct, should, at the latest, commence with fifteen years and extend as far as eighty years of age. But the chancery rule assumes, that all lives under thirty, are of the same value; and commencing with that age, has graduated the allowance from that period, at intervals of five years, no further than seventy-seven

¹ *Nightingale v. Lawson*, 1 Bro. C. C. 443.

² *Ante*, § 14.

³ *Ante*, § 14.

years of age. It is, therefore, confessedly nothing more than an approximation to truth; and is in this respect, materially defective.¹ . . . The rules which have been laid down or adopted, in relation to this matter, are manifestly defective, erroneous, and unjust. They are so contradictory as to be utterly irreconcilable by any ingenuity or argument; and yet, being rules laid down by the legislature, or approved by the court of appeals, this court can not, as in some other cases, make an election to follow any one in preference to another of them; or adopt any new general rules applicable to the same and all other similar estates, which should more nearly coincide with reason and justice. The subject can now only be extricated from the difficulties in which it has been involved, by the legislature."²

48. In a recent case in the same State, it was declared, that the ancient-rule of the court, fixing the allowance to a woman in lieu of dower, applies to all cases where it becomes necessary to ascertain the present value of a life interest. And that this rule having been sanctioned in the court of appeals,³ the authority of the court of chancery to change it, is questionable; and even if it could do so with propriety, the change should be prospective, and not so as to affect an actually depending case. This rule, it was added, has reference to the case of a healthy person, and where the *cestui que vie* is of infirm health, an abatement of the allowance should be made therefor; this is as imperatively required by the rule, as the ratio of distribution prescribed by it. In the case before the court, the *cestui que vie* was fifty-three years of age at the time of the sale, and it was proved that her health was infirm; that her constitution never had been robust, and that her lungs were diseased. It was held, that five years was a sufficiently large addition to her age, on account of ill health.⁴ "In the very nature of things," the court remarked, "it is absolutely impossible to establish a fixed standard upon a subject like this. Every case must depend on its own peculiar circumstances; and with all the lights which science can shed upon it, we can only hope to approximate to that which the future alone will reveal. Evidence has been taken in this case which certainly does show that the *cestui que vie* is in infirm health,

¹ Williams' case, 3 Bland, Ch. 275-278.

² Ibid. 281.

³ In Dorsey v. Smith, 7 Har. & J. 366.

⁴ Abercrombie v. Riddle, 3 Md. Ch. Dec. 320. See Peyton v. Ayres, 2 Md. Ch. Dec. 70, 71.

but we have not the benefit of the opinion of her physician with regard to the probable duration of her life. Even with the aid of such an opinion, we might wander far from the true mark; but without it, our conjectures are much more likely to lead us astray."

49. The South Carolina Act of 1786, prescribing the method of obtaining an admeasurement of dower, provides, that "when the land can not, in the opinion of a majority of the commissioners, be fairly and equally divided without manifest disadvantage, then they, or a majority of them, shall assess a sum of money to be paid to the widow in lieu of her dower, by the heir at law, or such other person or persons who may be in the possession of such land."¹ In several of the earlier cases in that State, it is laid down, that where, in equity, an estate is sold, a reasonable compensation must be allowed to the widow for her dower; but no principle is referred to by which the amount of such compensation is to be obtained.² In *Lesesne v. Russell*,³ it was held, that where commissioners appointed to award a widow a sum in lieu of dower, are guilty of no malpractice, and do not proceed upon erroneous principles, their return is conclusive, although the sum awarded may appear large. Shortly afterwards, it was determined, that the commissioners are required, under the law, to give to the widow one-third of each separate tract or parcel,⁴ or to assess a sum in lieu thereof, on every parcel, unless it is agreed by the heir or creditors to the contrary.⁵ In another case,⁶ an assessment of one-third of the value of the fee simple was set aside as excessive.⁷

50. In *Wright v. Jennings*,⁸ the following points were determined: When commissioners for the admeasurement of dower assess a sum of money to be paid in lieu of dower, they must return the appraised value of the land, as well as the sum assessed, in order that the court may know the basis of their assessment.⁹ In

¹ Act of 1786; P. L. 409; 4 Stat. 742.

² *Miller v. Cape*, 1 Desaus. 110, (1784); *Miller v. Miller*, Ibid. 111; *Clifford v. Clifford*, Ibid. 115, (1785); *Rutledge v. Williamson*, Ibid. 159, (1789).

³ *Lesesne v. Russell*, 1 Bay, 459, (1795).

⁴ Ante, ch. xxi., §§ 17-20.

⁵ *Scott v. Scott*, 1 Bay, 504.

⁶ In *Heyward v. Cuthbert*, 2 Con. Court (Treadw.), 626; s. c. 3 Brev. 482. A court of equity has the power to correct the assessment of the commissioners. *Payne v. Payne*, Dudl. Eq. 124; *Gibson v. Marshall*, 5 Rich. Eq. 254.

⁷ See, also, *Wright v. Jennings*, 1 Bailey, 277; *Garland v. Crow*, 2 Bailey, 24.

⁸ *Wright v. Jennings*, 1 Bailey, 277, (1829).

⁹ Vide *McCreary v. Cloud*, 2 Bail. 343, (1831). But if the commissioners have

South Carolina it has been usual to assess one-sixth of the value of the entire fee, as equivalent to the widow's estate for life in one-third of the land; and, as a general rule, the same proportion should always be adhered to in the assessment of dower, except in extreme cases of youth on the one hand, or of age and infirmity on the other. Referring to the statute of 1786, the court remarked: "None of the decided cases have fixed upon any general rule by which they ought to be governed. On the contrary, in the case of *Lesesne v. Russell*,¹ it was held, that where the commissioners are guilty of no malpractice, and do not proceed upon erroneous principles, their return is conclusive, although the sum awarded may appear large. But I think this is laying down the rule on too broad a scale. . . . Although, perhaps, no rule can be laid down, applicable to all cases, yet I am disposed to think, that a general rule may be adopted, subject only to such variations as special circumstances may require. The case of *Heyward v. Cuthbert*, was a second time before the court,² when it appeared that the commissioners had assessed one-sixth of the fee simple value of the estate; which assessment was sustained; and the same rule has generally prevailed since that period, and I believe has been approved by experience. We have no table of life annuities in this State, and if we had, the commissioners usually appointed for the performance of this duty would be very incompetent to apply it to the various cases that might arise. I think, therefore, that we had better adhere to the rule adopted in the case of *Mrs. Heyward*, except in extreme cases of youth on the one hand, or of age and infirmity on the other; in which, something more or less, according to circumstances, may be allowed."

51. In the case of *Keith v. Trapier*,³ Harper, Chancellor, observes upon the same subject as follows: "In assessing dower, a practice has prevailed, not sanctioned, so far as I know, by any express authority, of estimating all lives indiscriminately, at seven years; and this practice is founded on the legal notion, that taking all the lives in being, an average life, estimated at any given period, is seven years. Whether this practice has made a rule in all cases, is a question upon which, at present, I shall not express any definitive opinion."

actually been upon the land, and appraised it, they may be permitted to amend their return, so as to exhibit the entire value. *Ibid*.

¹ *Lesesne v. Russell*, 1 Bay, 459; ante, § 49.

² Vide 1 McCord, 386.

³ *Keith v. Trapier*, 1 Bailey, Eq. 63, (1830).

52. In *Payne v. Payne*,¹ it was decided, that the rule which substitutes the value of seven years' purchase, or one-sixth of the fee simple, in lieu of dower, was intended to operate prospectively only, and not to divest ascertained rights at the time of the assessment, as where the widow had survived, and the dower had been withheld for a longer time. Where the land was aliened during the coverture, the widow is entitled to the annual interest of one-third of the purchase-money, from the death of her husband, up to the time of the assessment; and to complete the measure of her remuneration, it ought to be continued during her life. When it is practicable, nothing short of this will satisfy the law; and it is only in those cases where it is impracticable, that a sum in gross should be substituted. The judge who delivered the opinion, said: "Something like a rule has been adopted by the court to regulate the assessment. By this, an ordinary life is estimated at seven years; and it will be found that the interest on the fee simple value of the one-third part for seven years, approximates very nearly to one-sixth part of the entire value of the estate; and that is the rule that is generally adopted in practice, varied, of course, by the circumstance whether the particular life was above or below the ordinary standard. In *Russell v. Gee*,² the value of the land at the time of the alienation, was adopted on the assessment of dower; but the court of chancery, then exercising an independent jurisdiction, adopted the value at the time the right of dower accrued; and to obviate this inconsistency, and to establish an uniform rule, was the well known object of the Act of 1824, which provides that when the husband has aliened the land in his lifetime, the value of the land at the time of the alienation, with the interest, should be taken as the value.³ The Act of 1825,⁴ provides, that the interest shall be computed from the time the right of dower accrued, and not from the time of alienation. It is apparent that none of these Acts were intended, nor can they be construed to operate, to diminish the measure, or the value of the widow's dower. They were only intended to regulate the mode of admeasuring or assigning it, when the estate was capable of division, and of ascertaining its value when it was not; the dower remains as at common law, and it is obvious that the rule which substitutes the value of seven years'

¹ *Payne v. Payne*, Dudley, Eq. 124, (1838).

² *Russell v. Gee*, 2 Mills, (Con. Court), 254, (1818).

³ See Acts of 1824, p. 24.

⁴ Acts of 1825, p. 20.

purchase, or one-sixth part of the fee simple value, when, as in this case, the widow has survived, and her dower has been withheld for a longer time, was intended to operate prospectively only, and not to divest ascertained rights. Nor can it apply where the measure of value can be ascertained with certainty."

53. It was held in *Douglass v. McDill*,¹ that where commissioners assess a sum of money in lieu of dower, they must award to the widow one-third of seven years' lawful interest of the money; value so assessed, which is taken in practice as one-sixth part of the entire assessment. If it appear from the return of the commissioners, that they have assessed a sum exceeding one-sixth part of the entire assessment, the court will not alter the return, but recommit it to them.² The court further declared, that the demandant may release or remit the excess, and thus remove the objection to the return. And upon her doing so, the return will be confirmed and entered of judgment. It was added, that the right of dower is the same as other legal rights to property, and as strictly regarded in the law; old or young, the widow has the same estate, and of course is entitled to the same equivalent.³

54. Where a sum of money is assessed in lieu of dower in lands of which the husband died seized, the widow, in addition to mesne profits, is entitled in equity, to interest on the sum assessed, from the time the return is confirmed until the money is paid.⁴

55. In *Wright v. Jennings*,⁵ the court expressed the opinion, that where the husband dies seized, the value of the land at the time of his death, is the proper basis for the assessment of dower; but the point was left undetermined. In *Keith v. Trapier*,⁶ the court said, that by whatever rule as to the duration of life, the value of the dower is assessed, the estimate must be made in reference to the time of the assessment, and not of the husband's death.⁷ In *Russell v. Gee*,⁸ the doctrine was laid down, that in assessing

¹ *Douglass v. McDill*, 1 Spears, 139, (1842).

² See *Hawkins v. Hall*, 2 Bay, 449. In a court of equity, the return of the commissioners, like the report of the master, is under the control of the court. *Gibson v. Marshall*, 5 Rich. Eq. 254. And the court has power to correct the assessment. *Payne v. Payne*, Dudley, Eq. 124.

³ Per Richardson, J.

⁴ *Woodward v. Woodward*, 2 Rich. Eq. 23, (1845).

⁵ *Wright v. Jennings*, 1 Bailey, 277; ante, § 50.

⁶ *Keith v. Trapier*, 1 Bailey, Eq. 63; ante, § 51.

⁷ See post, §§ 60, 61.

⁸ *Russell v. Gee*, 2 Mill, (Con. Court), 256. See observations upon this case in *Wright v. Jennings*, *supra*. See, also, *Payne v. Payne*, Dudley, Eq. 124; ante, § 52.

a sum in dower against a purchaser, on behalf of the widow of a former owner, the value of the land at the time of the alienation, is the proper rule.¹

56. The following case was also determined in South Carolina : J. S., after judgment had been obtained against him, sold a tract of land to C. D., and died. Proceedings were instituted by his widow to recover her dower in the land. The commissioners assessed a sum of money in lieu of dower, on which assessment, judgment was entered against C. D. Under this judgment, the land was sold, and purchased by C. D., who conveyed to the defendant. Afterwards, the land was sold under the judgment against J. S., and purchased by the plaintiff. It was held that the plaintiff was entitled to recover the land from the defendant.² The court were of opinion, that where a widow accepts a judgment for a sum of money in lieu of her dower, she stands on the same footing, *quoad* her judgment, as other judgment creditors ; and that a purchaser under a senior judgment recovered against her husband, while he was the owner of the land, acquires a paramount right as against a purchaser under the judgment in her favor. But it was said, that if, by reason of insolvency, the heir or purchaser fail to pay the sum assessed, the widow would have a clear right to fall back on her absolute interest in the land. Whether, in the above case, the purchaser under the judgment in favor of the widow, having satisfied her claim, could be subrogated to her rights as against the purchaser under the judgment against the husband, and compel the latter to remunerate him to the extent of the widow's dower, upon the ground that it was discharged for his benefit, was not determined.

57. In North Carolina, no general rule has been adopted for estimating the relative value of a life estate and a remainder or reversion in real property. And it is held, that every case must depend upon its own peculiar circumstances, to be weighed and adjudged on a reference to the clerk.³ "The truth is," said Ruffin, C. J., "that we have to encounter many and great difficulties here in estimating the relative values of a life estate in land and of the dry reversion expectant thereon. There is more or less uncertainty everywhere, as it depends upon a life. But, from long

¹ See post, § 62.

² *Bauskett v. Smith*, 2 Rich. L. 164.

³ *Atkins v. Kron*, 8 Ired. Eq. 1. See ante, ch. xxiii., § 11.

and careful observation, averages have been struck in particular countries, which enable persons skilled in such matters, to make, in their calculations, such probable approaches to actual results, that they suppose, taking a large number of lives together, they can deal respecting their duration rather upon the basis of mathematics than of chances. It is in that way that tables of longevity are constructed and the value of life annuities calculated. And in those countries where land has a fixed price, not varying indeed but with the value of money in different ages, and where all land readily finds a tenant, and generally an improving one, at a rent that does not fluctuate perceptibly within the period of one life, the value of a life estate may be estimated, from the existing income, with nearly the same confidence that a personal annuity may be. Hence, in the same country its value, or the rule of valuing it, may vary with different eras in the condition of the country. Formerly the average in England was one-third for the life estate, and two-thirds for the reversion. But as was observed by us in *Jones v. Sherrard*,¹ and on the authority of the case there cited, that rule has been decidedly condemned in more recent times. Now, no arbitrary proportion is taken, but it is referred to the master to inquire of the actual values, estimating that of the life estate upon the principle of life annuities, and therefore, having regard to the rate of interest, the annual value of the land, and the age, state of health, and the habits of the tenant for life. . . . Now, it is obvious, that the reliance to which those calculations are entitled, depends on the degree of certainty in the different elements which enter into it. These are the probable duration of life; which depends on the salubrity of the climate, and the age, health, and habits of the person; then the annual income of the estate for the term of years which has been fixed on as the measure of the life; and lastly, the consideration whether the price of land be stationary, or rising and falling in the country, and whether the fertility of the particular tract will be increased or diminished by the intermediate culture, or the like, so that the fee simple in possession will be intrinsically worth, when it shall fall in, as much as it is now, or more, or less."

58. In Massachusetts, the tables of Dr. Wigglesworth² have been

¹ *Jones v. Sherrard*, 2 Dev. & B. 179; ante, §§ 19, 20.

² Ante, § 24; Appendix, B.

adopted as a basis for estimating the probable duration of life.¹ In a case² in New York, where executors, having a power to sell real estate, procured a release of the widow's dower by paying a gross sum calculated in good faith, on the principles applicable to annuities, at a rate somewhere between that indicated by the Carlisle and that indicated by the Northampton tables,³ it was held, that they were justified in their course. In Alabama, it has been decided that one-ninth of the proceeds of the sale is not too small a compensation for the dower interest, the widow being thirty-seven years of age, though she may be in good health.⁴ In Virginia, it is said, that where the estate is sold, and the widow agrees to receive a gross sum in lieu of her dower, the court must direct an issue to have the amount ascertained.⁵

59. In New Jersey, where the widow consents to accept a gross sum in lieu of dower, the value of her interest is to be ascertained on the principles of life annuities.⁶ The table in use in that State, prepared at the request of the chancellor, is calculated upon the basis of the Carlisle table of mortality.⁷

Point of time at which the life interest is to be valued.

60. There is yet one other matter which must be attended to, and that is, as to the point of time at which the valuation of the life interest is to be made. A valuation as of the time when it arose, would, in many cases, give to the tenant for life its greatest value after he had enjoyed it many years; and therefore it would seem to be most correct to have the valuation put upon it at that point of time when it was to be taken away or extinguished; as in cases of dower, at the time when the land was sold free of such claim; or, where the life interest had been withheld, at the date of the order by which a sum in gross was directed by the court to be given in place of it; leaving the previous income which had, or might have accrued, and should have been paid, to be accounted

¹ Eastabrook v. Hapgood, 10 Mass. 313, 315, note. See Houghton v. Hapgood, 13 Pick. 154.

² Eagle v. Emmet, 4 Bradf. 117. In this State, the estimate is commonly made according to the Northampton tables. Dayton, Surr. p. 573, and App. lxvi.; Mathews v. Duryee, 45 Barb. 69.

³ Ante, § 15.

⁴ Sherard v. Sherard, 33 Ala. 488.

⁵ Pollard v. Underwood, 4 Hen. & M. 459; Davison v. Waite, 2 Munf. 527. See Blair v. Thompson, 11 Gratt. 441.

⁶ Mulford v. Hiers, 2 Beasl. Ch. 13.

⁷ Nixon's Dig., p. 934. See, also, McHenry v. Yokum, 27 Ill. 160; Hazelrig v. Hutson, 18 Ind. 481.

for as rents and profits. But where an annuity had been given to a child as an advancement, it was said, if it should be brought into hotchpot after the death of the parent, that a valuation ought to be put upon it as of the day when it was granted; and so, too, where a party comes as an expectant heir to set aside the contract on the ground of fraud and inadequacy of price, the valuation is to be calculated as of the day of the original transaction.¹

61. The question as to the exact point of time at which the valuation is to be adjusted, seems as yet, in England, to remain unsettled by any positive rule;² and in the United States, the subject has received but little consideration in the various courts. In Maryland, it has been held, that the valuation of the life interest is to be made as of the day of the sale by which it is extinguished.³ But where a widow was entitled to an allowance out of the proceeds of sales of partnership lands, in lieu of dower, and the husband died in 1825, but the sale was not made until 1845, it was held, that the age of the widow at the death of the husband should be taken in fixing her allowance. It was further determined, that she was entitled to interest from the day of sale, but not to arrears from his death until that day.⁴ In South Carolina, as we have seen,⁵ it was intimated in one case,⁶ that the value at the time of the husband's death should be the basis of the assessment; while in another, it was adjudged that the estimate must be made in reference to the time of the assessment.⁷ In New Jersey, the value of the dower is to be estimated as it existed at the time the statutory consent was given to accept an equivalent in money.⁸

Improvements made by the purchaser excluded from the estimate of value.

62. The rule excluding improvements made by a purchaser from the estimate of value, in assigning dower by metes and bounds,⁹

¹ *Ex parte* Le Compte, 1 Atk. 251; *Ex parte* Belton, 1 Atk. 251; *Kircudbright v. Kircudbright*, 8 Ves. Jr. 63; *Gowland v. De Faria*, 17 Ves. Jr. 24; *Williams' case*, 3 Bland, Ch. 244.

² *Butcher v. Churchill*, 14 Ves. Jr. 574; *Ex parte* Thistlewood, 19 Ves. Jr. 236; *Ex parte* Whitehead, 1 Meriv. 10, 127.

³ *Williams' case*, 3 Bland, Ch. 283.

⁴ *Goodburn v. Stevens*, 1 Md. Ch. 420.

⁵ *Ante*, § 55.

⁶ *Wright v. Jennings*, 1 Bailey, 277.

⁷ *Keith v. Trapier*, 1 Bailey, Eq. 63. See, also, *Russell v. Gee*, 2 Mill, (Con. Court), 256; *Payne v. Payne*, Dudley, Eq. 124; *ante*, § 52.

⁸ *Mulford v. Hiers*, 2 Beasl. Ch. 13, 16.

⁹ *Ante*, ch. xxii., §§ 5-26.

applies, also, where the assignment is made in the rents and profits, or where the widow receives a gross sum in lieu of dower. The rights of the purchaser are in no degree affected by the method adopted to satisfy the claim of the dowress.¹

Apportionment of incumbrance.

63. If the lands of the husband be subject to an incumbrance paramount to dower, the burthen is to be apportioned between the widow and the owner of the inheritance, according to the relative value of their respective estates; and this proportion is to be ascertained upon the principles already considered relating to the valuation of such estates.²

Apportionment not necessary if the incumbrance be left outstanding.

64. If the incumbrance be left outstanding, it is not necessary to put a present value upon the life estate in comparison with that of the inheritance, in order to adjust the proportion in which the burthen should be borne by each. In such case, it is held, that the tenant for life in possession must keep down the interest of the debt. For although the whole is liable to the creditors; yet as between the tenant for life and him in remainder, it is said to fall in with natural justice, that they who have a divided interest of an estate, should keep down the burthen during their own time; and therefore, by a construction in equity, the tenant for life is held bound to keep down the interest to the whole amount of the rents and profits; as otherwise the creditor may come upon his life estate for the principal. Whence it seems to have been taken for granted, as a general understanding, and as a natural apportionment, in all such cases, that he who has the *corpus* shall take the burthen; and

¹ Coates v. Cheever, 1 Cow. 460; Hale v. James, 6 John. Ch. 258; Van Gelder v. Post, 2 Edw. Ch. 577; Lewis v. James, 8 Humph. 537; Wright v. Jennings, 1 Bailey, 277; Beavers v. Smith, 11 Ala. 20; Francis v. Garrard, 18 Ala. 794; Russell v. Gee, 2 Mill. (Con. Court), 254; Springle v. Shields, 17 Ala. 295; Bowie v. Berry, 1 Md. Ch. Dec. 452; 2 Comp. Laws Mich., p. 855, § 1.

² Swaine v. Perine, 5 John. Ch. 482, 493; Evertson v. Tappen, Ibid. 497, 513; Bell v. Mayor of N. Y., 10 Paige, 49, 71; Gibson v. Crehore, 5 Pick. 146; Cass v. Martin, 6 N. H. 25; Foster v. Hilliard, 1 Story, 77; Carll v. Butman, 7 Greenl. 102; Simonton v. Gray, 34 Maine, 50; Lindsey v. Stevens, 5 Dana, 104; Chiswell v. Morris, 1 McCarter, Ch. (N. J.) 101; vol i., ch. xxiv., §§ 26-28; ante, p. 261, note.

he who has only the fruit shall pay to the extent of the fruit of the debt;¹ or in other words, that the rents and profits of the incumbered estate must have been specially intended to meet and keep down the interest of the debt, leaving the principal only to be treated as an incumbrance on the inheritance, or chief body of the estate. For it must be always remembered, that the tenant for life and the incumbrancers may at any time have the estate sold; and, after satisfying the debt, have the surplus, if any, apportioned between the tenant for life and the remainder-man according to their respective interests.² This rule compelling a tenant for life to discharge the interest of mortgages and other real incumbrances, applies as well to tenants for years,³ to tenants in dower, and a tenant by the curtesy, as to all other kinds of tenants for life;⁴ except that as to the dowress, she being entitled to but one-third of the estate during her life, will not be compelled to keep down more than one-third of the interest of any charges affecting the estate in which she is entitled to dower.⁵

¹ *White v. White*, 9 Ves. Jr. 560.

² *Hungerford v. Hungerford*, Gilb. Eq. R. 69; *Revel v. Watkinson*, 1 Ves. Sr. 93; *Amesbury v. Brown*, 1 Ves. Sr. 477; *Saville v. Saville*, 2 Atk. 463; *Penrhyn v. Hughes*, 5 Ves. Jr. 107; *Powell, Mortg.* 921, note H.

³ *Amesbury v. Brown*, 1 Ves. Sr. 480.

⁴ *Peterborough v. Mordaunt*, 1 Eden, 478; *Tracy v. Hereford*, 2 Bro. C. C. 128; *Shrewsbury v. Shrewsbury*, 3 Bro. C. C. 126; s. c. 1 Ves. Jr. 227; *Bertie v. Abingdon*, 3 Meriv. 560; *Burges v. Mawbey*, 11 Cond. Ch. Rep. 96.

⁵ *Banks v. Sutton*, 2 P. Wms. 716; *Williams' case*, 3 Bland, Ch. 244, 245; *Swaine v. Perine*, 5 John. Ch. 482, 493; *Bell v. Mayor of N. Y.*, 10 Paige, 49, 71; *House v. House*, *Ibid.* 158, 164; vol. i., ch. 24, §§ 26, 27. Chancellor Bland, in *Williams' case*, 3 Bland, Ch. 186, 221-283, goes into a learned and elaborate discussion of the subject of estimating the present value of estates for life, and examines very fully the principal authorities bearing upon it. From the opinion delivered in that case, I have derived valuable assistance in the preparation of the present chapter.

CHAPTER XXV.

RECOVERY OF DAMAGES IN A COURT OF LAW.

§ 1. At common law no damages recoverable by the widow.

2, 3. The statute of Merton.

4-7. By the terms of the statute the husband must die seized.

8-13. Extent of the recovery against the heir where the plea *tout temps prist* is not interposed.

14-19. Recovery where *tout temps prist* is pleaded.

20-29. Damages as against the alienee of the husband.

30-34. Damages as against the alienee of the heir.

35. Measure of damages where there is an outstanding term for years.

36, 37. Instances in which damages are not recoverable.

38. Demand of dower.

39-47. Method of ascertaining the damages.

48, 49. Distinction between the judgment for dower and the award of damages.

50-53. Death of demandant pending proceedings.

54-56. Death of the tenant.

57. The statute of limitations as affecting the recovery.

58. Improvements by the purchaser excluded from the estimate of value.

59. Improvements by the heir.

60, 61. Costs.

62-65. Damages on proceedings in error.

66. The statute of Merton as affecting proceedings in equity.

At common law no damages recoverable by the widow.

1. WHEN dower was detained from the widow, and she was obliged to bring a writ of dower, she was, by the common law, entitled to the profits of her third part of the lands from the time only when she recovered judgment; for the tenant was permitted to retain the profits of the estate intermediate the recovery against him in possessory actions and his entry into possession, to enable him to perform the feudal services; so that in all these actions, (except in novel disseizin against the disseizors only),¹ no damages were recoverable by the demandant.² By Magna Carta,³ indeed, as we have seen,⁴ the dower of the widow was to be assigned to

¹ Stat. 6 Edw. I., c. 1. This action has been abolished by the 3 & 4 Will. IV., c. 27, § 36. 1 Bright, H. & W. 407, note.

² 1 Roper, H. & W. 437; Park, Dow. 301. See 2 Inst. 286; 10 Co. 116.

³ Cap. 7.

⁴ Vol. i., ch. i., § 15.

her within forty days after the death of her husband; but, as Lord Coke observes,¹ "of little effect was that Act, for that no penalty was thereby provided if it were not done."

The statute of Merton.

2. This rule being found to be unjust in process of time when the actual performance of the feudal duties began to be discontinued, statutes were made giving damages and costs in various possessory actions.² Among these enactments was the statute of Merton,³ which partially remedied the defects in the common law in cases of dower by providing that, "of widows which after the death of their husbands are deforced of their dowers, and can not have their dower or quarantine without plea, whosoever deforce them of their dowers, or quarantine of the lands whereof their husbands died seized, and that the same widows after shall recover by plea, they that be convicted of such wrongful deforcement, shall yield damages to the same widows; that is to say, the value of the whole dower to them belonging from the time of the death of their husbands, unto the day that the said widows, by judgment of our court, have recovered seizin of their dower, &c.; and the deforcers nevertheless shall be amerced at the king's pleasure."⁴

3. The provisions of the statute of Merton were in substance adopted in Massachusetts in 1783,⁵ in Virginia in 1785,⁶ in New York in 1787,⁷ and have been incorporated in the dower Acts of most of the States.⁸ In a case in Delaware, it was said, that the

¹ Co. Litt. 32 b. See vol. i., ch. i., § 24.

² Marl. 52 Hen. III., c. 16; 6 Edw. I., c. 1.

³ 20 Hen. III., c. 1. See vol. i., ch. i., § 25.

⁴ 2 Inst. 80; Park, Dow. 301.

⁵ 4 Kent, 65.

⁶ 12 Hen. Stat. 163.

⁷ 1 Laws N. Y. (1813), p. 57, § 2.

⁸ Gen. Stat. Mass. p. 697, §§ 4-7; Rev. Stat. Maine, 1857, ch. 103, § 6; p. 607, §§ 22-24; Code Va. 1849, p. 475, §§ 10, 11; p. 476, § 12; Nixon's Dig. Stat. N. J. p. 209, § 3; Del. Code, 1852, p. 292, § 13; Rev. Stat. R. I. 1857, p. 504, § 5; p. 505, §§ 13, 14; N. H. Comp. Stat. 1853, p. 521, § 4; Dig. Stat. Ark. 1858, p. 115, § 65; p. 457, § 49; 2 Rev. Stat. Ky. by Stanton, p. 26, §§ 9, 10; Rev. Code N. C. 1855, p. 605, § 25; 1 Stat. Ill. 1858, p. 155, §§ 26, 28; 1 Rev. Stat. Misso. 1855, p. 673, § 26; p. 675, § 31; p. 676, §§ 34, 36; Comp. Laws Kansas, 1862, p. 480, § 17; p. 481, § 20; p. 482, §§ 23, 25; 1 Rev. Stat. N. Y. p. 742, §§ 19, 20; p. 743, §§ 21, 22; 2 Comp. Laws Mich. p. 854, §§ 24-27; Stat. Minn. 1858, p. 409, § 24; p. 410, §§ 25-27; Rev. Stat. Wis. 1858, p. 548, §§ 24-27; Stat. Oregon, 1855, p. 408, §§ 24-27. Under the Iowa statute of Dec. 29, 1838, and ch. 116 of the Code, damages were recoverable in an action of dower. *O'Ferrall v. Simplot*, 4 Iowa, 381

statute had always been in force in that State.¹ The Indiana Territorial Act of 1795, gave the widow damages where the tenant neglected to assign dower upon demand.² In Ohio, the statute of 1795,³ gave "reasonable damages." The Act of 1804,⁴ was silent as to damages, but gave to the widow a "reasonable support" out of the husband's estate. The Act of 1805,⁵ restored the right to "reasonable damages." The law of 1824,⁶ contained no provision upon the subject, and after the passage of this enactment, damages were not recoverable in that State in proceedings for dower,⁷ until the adoption of the Act of 1843, which conferred upon the widow the right to one-third of the net rents accruing during the pendency of the action.⁸ In South Carolina, the widow can not recover damages in the courts of law where the husband died seized.⁹ The Acts of 1824 and 1825, entitling her to interest on assessments made in lieu of dower,¹⁰ are confined to cases where the husband aliened the lands during the coverture.¹¹

By the terms of the statute the husband must die seized.

4. The language of the statute of Merton, it will be observed, extends the recovery of damages to those cases only, where the husband died seized.¹² The seizin intended by the statute, is a seizin of the inheritance, so that upon the death of the husband, the possession immediately devolves upon the heir.¹³ If, therefore, the

Nor was the statute of Merton affected by § 6 of the Act of July 30, 1840. *Ibid.* In Indiana, it has been held, that a decree for dower is not erroneous in not giving damages where it does not appear that the property was of any value. *Smith v. Addleman*, 5 Blackf. 406.

¹ *Layton v. Butler*, 4 Harring. 507.

² *Adkins v. Holmes*, 2 Carter (Ind.), 197.

³ Chase, 187, § 2.

⁴ *Ibid.* 395.

⁵ *Ibid.* 473, § 11.

⁶ *Ibid.* 1315.

⁷ *Bk. U. S. v. Dunseth*, 10 Ohio, 18

⁸ 41 Ohio Laws, 6; 1 Swan & Critchf. 522.

⁹ *Heyward v. Cuthbert*, 1 M'Cord, 386; *Wright v. Jennings*, 1 Bailey, L. 277; *McCreary v. Cloud*, 2 Bailey, 343; *Lamar v. Scott*, 4 Rich. L. 516. But she may have relief in the courts of equity. *Mey v. Mey*, 1 Bailey, L. 277, note; *Gordon v. Stevens*, 2 Hill (S. C.) Ch. 429; post, ch. xxvi., § 9.

¹⁰ See ante, ch. xxiv., §§ 49-56.

¹¹ *Heyward v. Cuthbert*, 1 M'Cord, 386; *Wright v. Jennings*, 1 Bailey, L. 277; *McCreary v. Cloud*, 2 Bailey, L. 343; *Lamar v. Scott*, 4 Rich. L. 516. See post, ch. xxvi., § 9, and note.

¹² *Jenk. Cent.* 1, ca. 85; *Dyer*, 284 a., pl. 33; *Bro. Damages*, pl. 52.

¹³ *Co. Litt.* 32 b.

husband make a feoffment to the use of himself for life, remainder to his son in tail, and die during the continuance of the entail, his widow will not be entitled to damages under the statute; because the husband was only actually seized of an estate of freehold when he died, viz.: for his life, with a reversion expectant upon the determination of an estate tail.¹ But if he die seized of an estate tail, this is sufficient to entitle the widow to damages.²

5. The provision of the statute of Merton restricting the right to recover damages to cases where the husband died seized, is adopted in New York,³ Pennsylvania,⁴ New Jersey,⁵ Maine,⁶ Maryland,⁷ Virginia,⁸ Kentucky,⁹ Delaware,¹⁰ North Carolina,¹¹ Missouri,¹² Ala-

¹ Yelv. 112; Dame Egerton's case, cited Litt. R. 341; Hargr. Co. Litt. 32 b., note (4); 3 Bulstr. 278; 1 Roper, H. & W. 438. And it has been held, that if the husband be outlawed, the wife shall not recover damages, upon the ground that this is a forfeiture of the frank-tenement. Bro. Dam. pl. 98; Bro. Utlagary, pl. 36. But Brooke makes a query thereof, for the forfeiture was but of the profits, and not of the frank-tenement. And see Bro. Forfeiture de Terres, pl. 30, 75; Bro. Utlagary, pl. 59; Park, Dow. 302, note.

² Thynn v. Thynn, Styles, 69; Park, Dow. 302.

³ 1 Rev. Stat. N. Y. p. 742, § 19; Embree v. Ellis, 2 John. 119; Humphrey v. Phinney, Ibid. 484; Hitchcock v. Harrington, 6 John. 290; Jackson v. Donaghy, 7 John. 247; Hazen v. Thurber, 4 John. Ch. 604; Russell v. Austin, 1 Paige, 192.

⁴ Sharp v. Pettit, 4 Dall. 212; Leggett v. Steele, 4 Wash. C. C. 305; Winder v. Little, 1 Yeates, 152; Seaton v. Jamison, 7 Watts, 533; Barnett v. Barnett, 16 S. & R. 51.

⁵ Nixon's Dig. p. 209, § 3; Fisher v. Morgan, Coxe, 125; Sheppard v. Wardell, Ibid. 452; Martin v. Martin, 2 Green, 125; Young v. McPherson, 2 Penning. 895; Hopper v. Hopper, 2 Zab. 715; s. c. 1 Zab. 543. But where the husband did not die seized, the widow recovers damages from the time of demand. Nixon's Dig. p. 209, § 3; Chiswell v. Morris, 1 McCarter, Ch. 101.

⁶ Rev. Stat. Maine, 1857, ch. 103, § 6; Bolster v. Cushman, 34 Maine, 428.

⁷ Steiger v. Hillen, 5 Gill & J. 121; Kiddall v. Trimble, 1 Md. Ch. Dec. 143; s. c. 8 Gill, 207; Sellman v. Bowen, 8 Gill & J. 50; Chew v. Farmers Bk., 9 Gill, 361.

⁸ Code Va. 1849, p. 475, §§ 10, 11; Tod v. Baylor, 4 Leigh, 498; Thomas v. Gam-mel, 6 Leigh, 9.

⁹ 2 Ky. Rev. Stat. by Stanton, p. 26, §§ 9, 10; Waters v. Gooch, 6 J. J. Marsh. 586; Kendall v. Honey, 5 Mon. 282; Marshall v. Anderson, 1 B. Mon. 198; McElroy v. Wathen, 3 B. Mon. 135; Garton v. Bates, 4 B. Mon. 366; Hill v. Golden, 16 B. Mon. 551; Yancy v. Smith, 2 Met. (Ky.) 408.

¹⁰ Del. Code, 1852, p. 292, § 13; Newbold v. Ridgway, 1 Harring. 55; Layton v. Butler, 4 Harring. 507.

¹¹ Rev. Code N. C. 1855, p. 605, § 25; Sutton v. Burrows, 2 Murph. 79.

¹² 1 Rev. Stat. Misso. 1855, p. 673, § 26; Rankin v. Oliphant, 9 Misso. 239; McClanahan v. Porter, 10 Misso. 746. Damages may be recovered from the time of demanding dower where the husband did not die seized. 1 Rev. Stat. Misso. 1855, p. 673, § 26.

bama,¹ Wisconsin,² Minnesota,³ Michigan,⁴ Oregon,⁵ and Kansas,⁶ and formerly prevailed in Iowa.⁷

6. But a term for years, carved out of the estate, will not, as it has been before shown,⁸ prevent the husband's seizin of the inheritance. If, therefore, the lands of which the widow is dowable, be subject to a demise for years, created by the husband previously to the marriage, upon which a rent is reserved, his widow will be entitled to recover a third part of the reversion, and a like proportion of the rent and damages; because the husband died seized of the freehold and of the inheritance.⁹ And it has been held in Kentucky, that where the husband has made a contract for the sale and conveyance of his lands, but dies before the execution of the conveyance, the legal seizin of the title with which he is invested, will entitle his widow to damages.¹⁰

7. In several of the States, damages are recoverable whether the husband died seized or not, but only from the time of demand. This is the case in Massachusetts,¹¹ New Hampshire,¹² Rhode Island,¹³ Illinois,¹⁴ and was formerly the law in Indiana.¹⁵ So, in New Jersey,¹⁶ Missouri,¹⁷ and Kansas,¹⁸ damages may be recovered against the alienee of the husband from the time of demand. In Ohio, from the time of the commencement of the suit.¹⁹ In Arkansas, the statute directs, that until dower is apportioned, the court shall order such sum to be paid to the widow out of the rent of the estate, as shall be in proportion to her interest therein.²⁰

¹ *Beavers v. Smith*, 11 Ala. 20; *Slatters v. Meek*, 35 Ala. 528.

² *Rev. Stat. Wis.* 1858, p. 548, § 24; *Thrasher v. Tyack*, 15 Wis. 256.

³ *Stat. Minn.* 1858, p. 409, § 24.

⁴ 2 *Comp.-Laws Mich.* p. 854, § 24.

⁵ *Stat. Oregon*, 1855, p. 408, § 24.

⁶ *Comp. Laws Kansas*, 1862, p. 480, § 17. If the husband do not die seized, damages may be recovered from the time of demand. *Ibid.*

⁷ *O'Ferrall v. Simplot*, 4 Iowa, 381.

⁸ Vol. i., ch. xi., § 5.

⁹ *Co. Litt.* 32 b.; 1 *Roper, H. & W.* 438. See post, § 35, as to the measure of the recovery of damages in such case.

¹⁰ *McElroy v. Wathen*, 3 B. Mon. 135.

¹¹ *Stearns, Real Act.* 313; *Gen. Stat. Mass.* p. 697, §§ 2, 4, 5, 6.

¹² *N. H. Comp. Stat.* 1853, p. 521, § 4.

¹³ *Rev. Stat. R. I.* 1857, p. 504, § 5.

¹⁴ 1 *Stat. Ill.* 1858, p. 155, § 26; *Nicoll v. Ogden*, 29 Ill. 323.

¹⁵ *Adkins v. Holmes*, 2 *Carter (Ind.)*, 197; *Kirby v. Holmes*, 6 Ind. 33; *Williamson v. Ash*, 7 Ind. 495.

¹⁶ *Nixon's Dig.* p. 209, § 3.

¹⁷ 1 *Rev. Stat. Misso.* 1855, p. 673, § 26.

¹⁸ *Comp. Laws Kansas*, 1862, p. 480, § 17.

¹⁹ 1 *Rev. Stat. Ohio*, p. 522, § 18.

²⁰ *Dig. Stat. Ark.* 1858, p. 115, § 65.

Extent of the recovery against the heir where the plea of tout temps prist is not interposed.

8. By the words of the statute, damages are given from the death of the husband to the day that the widow recovers seizin by judgment. By damages, are to be understood, according to the English authorities, the profits of the third part of the estate since the death of the husband, (after deducting outgoings), and such additional sum as will compensate the widow for any further loss she may have sustained by reason of the detention of her dower.¹ The value of the rents and profits, and the additional compensation for the delay, are usually assessed severally, although damages given generally without finding the value of the land, are good.²

9. If judgment be obtained upon the default or *nihil dicit* of the tenant, and a writ of inquiry issue to ascertain the damages, they may be carried down to the time of the inquisition,³ unless the demandant has been in possession of her third part of the lands under execution awarded upon such judgment; in which case the value is computed only to the time of seizin delivered.⁴ If, however, damages be assessed without allowance for taxes and repairs, the assessment will be erroneous and liable to be set aside; for under the words *ultra reprisas* in the writ of dower, deductions of such and the like articles are required to be made.⁵

10. In New Jersey, the widow is entitled to her proportion of the mesne profits, to be computed from the death of her husband until the recovery of seizin by judgment.⁶ The rule is the same in New York,⁷ except that there can be no recovery for a longer period

¹ Doct. & Stud. 140; Hargr. Co. Litt. 32 b., note (4). And see *Spiller v. Andrews*, Lill. Ent. 188; 8 Mod. 25; *Walker v. Neville*, 1 Leon. 56; *Penrice v. Penrice*, 2 Barnes, 191. See post, § 13.

² *Hawes' case*, Hetl. 141; *Park, Dow.* 306. See 2 Saund. 44 e., note; *Ibid.* 331; *Bull. N. P.* 117.

³ *Dobson v. Dobson*, Ca. temp. Hardw. 19; 2 Barn. B. R. 180, 207; *Park, Dow.* 308. And see the record in *Spiller v. Andrews*, Lill. Ent. 189, incorrectly reported in 8 Mod. 25; *Thynn v. Thynn*, T. 1649, cited Hargr. Co. Litt. 32 b., note (4); *contra*, *Penrice v. Penrice*, 2 Barnes, 191.

⁴ *Walker v. Neville*, 1 Leon. 56; *Park, Dow.* 308.

⁵ *Penrice v. Penrice*, Barnes, 234; 1 Roper, H. & W. 440.

⁶ *Nixon's Dig.*, p. 209, § 3; *Hopper v. Hopper*, 2 Zab. 715.

⁷ 1 Rev. Stat. N. Y., p. 742, § 20; p. 743, § 22; 4 Kent, 69; *Jackson v. O'Donaghy*, 7 John. 247; *Hazen v. Thurber*, 4 John. Ch. 604; *Bell v. Mayor N. Y.*, 10 Paige, 70.

than six years.¹ In a case in equity, where there were several heirs and terre-tenants, the amount was directed to be assessed upon them respectively, according to the time of their enjoyment of the premises.² In Delaware, also, damages may be recovered against the heir from the period of the husband's death.³ So in Michigan,⁴ Wisconsin,⁵ Minnesota,⁶ and Oregon.⁷ So in Maryland;⁸ and in that State, an account for the rents and profits may be brought down to the date of the decree, or to the time of the delivery of possession of the dower.⁹ So in Alabama,¹⁰ Florida,¹¹ Virginia,¹² Kentucky,¹³ Kansas,¹⁴ and Missouri.¹⁵ And, in the last named State, the value is to be estimated, not as of any particular period, but according to the productive value of the property at the different periods in which the widow was deprived of her dower.¹⁶ In North Carolina, if the husband die seized, the widow is entitled to an account for mesne profits from the time of his death to the date of the assignment of the dower.¹⁷ And where buildings which had been insured were burned after the death of the husband, she was awarded a *pro rata* share of the insurance money.¹⁸

11. In Massachusetts, damages are allowed from the time of the demand, if the action be against the person of whom the demand was made. If against a subsequent purchaser, he is liable only for the time during which he held the premises.¹⁹ The rule is substan-

¹ Post, § 57.

² *Hazen v. Thurber*, 4 John. Ch. 604.

³ *Layton v. Butler*, 4 Harring. 507.

⁴ 2 Comp. Laws Mich., p. 854, § 25.

⁵ Rev. Stat. Wis. 1858, p. 548, § 25.

⁶ Stat. Minn. 1858, p. 410, § 25.

⁷ Stat. Oregon, 1855, p. 408, § 25.

⁸ *Wells v. Beall*, 2 Gill & J. 468; *Chase's case*, 1 Bland, Ch. 206, 231; *Darnall v. Hill*, 12 Gill & J. 388.

⁹ *Darnall v. Hill*, 12 Gill & J. 388.

¹⁰ *Beavers v. Smith*, 11 Ala. 20; *Slatter v. Meek*, 35 Ala. 528.

¹¹ *May v. May*, 7 Florida, 207.

¹² Code Va. 1849, p. 475, § 11; *Tod v. Baylor*, 4 Leigh, 498; *Thomas v. Gammel*, 6 Leigh, 9. But there can be no recovery for a longer period than five years. Code Va. 1849, p. 475, § 11.

¹³ 2 Rev. Stat. Ky. by Stanton, p. 26, § 9. But the recovery is restricted to five years before the commencement of the action. Ibid. § 10. See *Wood v. Lee*, 5 Mon. 50.

¹⁴ Comp. Laws Kansas, 1862, p. 480, § 17.

¹⁵ 1 Rev. Stat. Misso. 1855, p. 673, § 26; *McClanahan v. Porter*, 10 Misso. 746.

¹⁶ *McClanahan v. Porter*, 10 Misso. 746.

¹⁷ Rev. Code N. C. 1855, p. 605, § 25; *Sutton v. Burrows*, 2 Murph. 79; *Spencer v. Weston*, 1 Dev. & B. 213; *Campbell v. Murphy*, 2 Jones, Eq. 357.

¹⁸ *Campbell v. Murphy*, 2 Jones, Eq. 357, 363, 364.

¹⁹ Gen. Stat. Mass., ch. 135, §§ 4, 5, 6; 1 Washb. R. P., 2d ed., 231; *Perry v. Goodwin*, 6 Mass. 498. See post, § 25.

tially the same in Maine,¹ New Hampshire,² and Rhode Island.³ In Illinois, the recovery is from the date of the demand.⁴ In Ohio, the damages are computed from the date of filing the petition.⁵

12. The Indiana statute of 1838, contained the following provision:⁶ "In cases of demand and refusal to assign dower, where there is no minor heir, the widow shall be entitled to reasonable damages from the heir or other person, as aforesaid, from the time of such demand to the time of the assignment of her dower." By the Act of 1843, when a widow recovered dower in a suit against the heir, she was entitled to damages for the withholding of her dower, to be estimated from the death of her husband.⁷ In the case of *Adkins v. Holmes*,⁸ the court, in commenting upon these statutes, said: "As there were minor heirs, the petitioners were not entitled, under the statute of 1838, to any damages. Their claim to damages depends entirely on the Act of 1843. The husband died about January, 1843, and the dower was demanded in October of that year. The Act of 1843 took effect in March, 1844. Under these circumstances, we are of opinion, that the damages recoverable against the heirs in this case, are such as accrued after the Act of 1843 took effect."⁹

13. There are but few of the American States in which the right of the widow to damages *occasione detentione dotis*¹⁰ is recognized. The prevailing doctrine entitles her to one-third of the annual value of the mesne profits, but to nothing more.¹¹ In New Jersey, the point has been discussed, but not determined.¹² But in South Carolina it has been expressly laid down, that the widow may recover damages for the detention of her dower, in addition to her share of the profits proceeding from the estate.¹³

¹ Rev. Stat. Maine, 1857, p. 607, §§ 22, 23.

² N. H. Comp. Stat. 1853, p. 521, § 4.

³ Rev. Stat. R. I. 1857, p. 504, § 5.

⁴ 1 Stat. Ill. 1858, p. 155, § 26.

⁵ 1 Rev. Stat. Ohio, p. 522, § 18.

⁶ R. S. 1838, p. 240.

⁷ R. S. 1843, p. 807.

⁸ *Adkins v. Holmes*, 2 Carter (Ind.), 197.

⁹ See, also, *Kirby v. Holmes*, 6 Ind. 33; *Williamson v. Ash*, 7 Ind. 495; *Galbreath v. Gray*, 20 Ind. 290.

¹⁰ See ante, § 8.

¹¹ 4 Kent, 69; 1 Washb. R. P., 2d ed., 230, 231; Sedgwick on Dam. 130.

¹² *Fisher v. Morgan, Coxe*, 125, (1792); *Martin v. Martin*, 2 Green (N. J.), 125. See, also, *Layton v. Butler*, 4 Harring. 507, 510, 511.

¹³ *Keith v. Trapier*, 1 Bailey, Eq. 63.

Recovery where tout temps prist is pleaded.

14. The heir may, as has been already noticed,¹ save himself from damages, if he come in and acknowledge the action, and plead *tout temps prist*, i. e. aver that he was at all times ready to render dower, if it had been demanded. For this reason it is, that Lord Coke observes, "it is necessary for the wife, after the decease of her husband, as soon as she can, to demand her dower before good testimony; for otherwise she may, by her own default, lose the value after the decease of her husband, and her damages for detaining of dower."² In what cases the heir may avail himself of this plea has been already stated.³ If the demandant take issue upon it, the damages will await the event of the issue.⁴

15. If the heir controvert the title of dower, he can not, of course, have the benefit of the plea of *tout temps prist*; and therefore, whatever delay may have occurred, the widow will, if judgment be given in her favor, be entitled to damages from the death of her husband.⁵ The same rule applies where the heir omits to set up the widow's neglect to demand her dower.⁶ Lord Coke indeed, remarks, that "some say that the demandant in a writ of dower, that delayeth herself, shall not recover damages;"⁷ but this seems to be no further true than as it may enable the heir to save himself of damages, on the plea of *tout temps prist*. In *Dobson v. Dobson*,⁸ in error upon a judgment in dower, one of the errors assigned was, that damages were given *à morte viri*, whereas they ought only to have been given from the time of suing out the writ, since it did not appear there was any demand of dower *in pais*; and Co. Litt. 32, 33, was cited, that the demandant should take care to make demand as soon as possible, lest she lose the value of her dower, and that the heir does no wrong till a demand is made. But it was replied, that it was incumbent on the tenants, would they have excused themselves from damages, to plead *tout temps prist*, as the words of the statute⁹ expressly require; and upon this answer,

¹ Ante, ch. v., §§ 44-46.

² Co. Litt. 32 b. And see Gilb. Dow. 375, 376. ³ Ante, ch. v., §§ 44-46.

⁴ Co. Litt. 32 b., 33 a.; Doct. & Stud. 141; Bro. Damages, pl. 52, 79; Bro. Dow., pl. 32; Gilb. Uses, 375.

⁵ Park, Dow. 304.

⁶ Bull. N. P. 117; 1 Roper, H. & W. 445.

⁷ Co. Litt. 32 b. And see Gilb. Dow. 375, 376.

⁸ *Dobson v. Dobson*, Ca. temp. Hardw. 19; 2 Barn. B. R. 180.

⁹ *Quære*, what statute? Park, Dow. 305, note.

the court overruled the exception. And in *Kent v. Kent*,¹ the same exception was overruled in a case where the writ was not brought until two years after the death of the husband.

16. Where the demandant, after the death of her husband, entered and continued in possession five years, and afterwards the heir entered, upon which she brought dower, it was agreed that the tenant need not plead *tout temps prist* after his re-entry, for the time the demandant had occupied was a sufficient recompense for the damages.²

17. In a case in New Jersey, where the demandant received compensation for the annual value of her dower, during the heir's possession of the freehold, it was held, that evidence of that fact should be given in mitigation of damages upon the execution of the writ of inquiry; and that it was not pleadable in the action.³ In Alabama, it has been held, that if the widow occupy lands afterwards assigned for her dower, interest on the value of such portion is to be set off against her claim.⁴ But the occupation by her of the dwelling-house under the statute,⁵ until her dower is assigned, does not impair her right to mesne profits of other lands of which dower is withheld.⁶

18. It was held in some of the earlier cases in New Jersey, that *tout temps prist* might be pleaded by the heir in actions for the recovery of dower and damages for its detention.⁷ But it is now settled, under the statute of that State, that where the husband dies seized, no demand is necessary to enable the widow to recover damages from the period of his death, and that *tout temps prist* is not a good plea in bar of her claim.⁸

19. But even where the heir pleads *tout temps prist* with success, the demandant is entitled to recover damages from the teste of the original to the execution of the writ of inquiry.⁹ The doctrine of the English courts in this particular has been recognized

¹ *Kent v. Kent*, 2 Stra. 971; s. c. 2 Barn. B. R. 357.

² *Riche's case*, 3 Leon. 52; Dal. 100. But see *Belfield v. Rous*, 4 Leon. 198, and *quere*.

³ *Woodruff v. Brown*, 2 Harr. 246.

⁴ *Springle v. Shields*, 17 Ala. 295.

⁵ Code, § 1359.

⁶ *Perrine v. Perrine*, 35 Ala. 644.

⁷ *Woodruff v. Brown*, 2 Harr. 246, Ford and Nevius, JJ., dissenting; *Hopper v. Hopper*, 1 Zab. 543.

⁸ *Hopper v. Hopper*, 2 Zab. 715, in the court of errors and appeals, reversing judgment of supreme court in same case, 1 Zab. 543.

⁹ *Barnes*, 234; Bull. N. P. 117; *Park, Dow*, 303; 1 *Roper*, H. & W. 445.

in Delaware,¹ and in Maryland;² and, it is apprehended, is generally adopted in the United States.

Damages as against the alienee of the husband.

20. Upon this subject, Mr. Park has the following observations:³ "It seems, however, that although the husband does not die seized, the wife may become entitled to damages against the alienee, by a demand and refusal of dower, but such damages will be recovered only from the time of the demand.⁴ On this point the books observe, that 'she can lay no default in the feoffee till she demand her dower upon the ground, and that the tenant be not there to assign it; or if he be there, that he will not assign it; for he that hath the possession of land whereunto any woman hath title of dower, hath good authority, as against her, to take the profits till she require her dower.'"⁵

21. Mr. Roper remarks in regard to this matter as follows:⁶ "If, on the other hand, the husband did not die seized, having aliened the lands, the widow will not be entitled at law to mesne profits, damages, or costs, because such a case is not within the provisions of the statutes of Merton and Gloucester; and by the common law, as we have seen, she was only entitled to recover one-third of the lands and of their value from the time she obtained judgment for her dower." To this, Mr. Jacob appends the following note:⁷ "It is said in Jenkins,⁸ that where the husband does not die seized, if the widow demands her dower and the tenant refuses, she shall recover damages from the time of the refusal; but this dictum is not supported by the other authorities, and the case is certainly not within the statute of Merton."

22. In New York, in an early case,⁹ it was held, that where the husband has aliened, no damages can be recovered against the alienee; and in that case, the widow was required to remit the damages which had been assessed by the jury. But subsequently, in a case in chancery, a purchaser under execution against the husband, and who had also become the assignee of a mortgage para-

¹ Layton v. Butler, 4 Harring. 507.

² Darnall v. Hill, 12 Gill & J. 388.

³ Park, Dow. 302.

⁴ Jenk. Cent. 1, ca. 85; Doctor & Stud. Dial. II., ch. 14.

⁵ Doctor & Stud. Dial. II., ch. 14.

⁶ 1 Roper, H. & W. 440.

⁷ Ibid. note.

⁸ Page 45.

⁹ Embree v. Ellis, 2 John. 119.

mount to dower, was required to account for the rents and profits accruing subsequently to the date of his purchase.¹ In *Humphrey v. Phinney*,² a plea by the purchaser that valuable improvements had been made after the husband had conveyed the premises, and that since the death of the latter, he had been, and still was, ready to set off one-third of the estate according to its actual value at the time of the conveyance by the husband, was sustained.

23. It was decided in a case in Maryland, that damages may be recovered at law against the alienee of the husband;³ but this decision was afterwards overruled.⁴ It is settled, however, that in equity, a widow may have a decree for the rents and profits against the alienee, accruing after her dower was demanded;⁵ and she may proceed in equity for the rents, after she has recovered her dower at law.⁶

24. In Delaware,⁷ New Jersey,⁸ Missouri,⁹ Kansas,¹⁰ Iowa,¹¹ New Hampshire,¹² Rhode Island,¹³ and Illinois,¹⁴ the alienee is held liable for damages from the time of a demand and refusal to assign dower. The rule seems to be the same in Pennsylvania,¹⁵ and was at one time in force in Indiana.¹⁶ In Virginia,¹⁷ and Ohio,¹⁸ the

¹ *Russell v. Austin*, 1 Paige, 192. See 4 Kent, 69.

² *Humphrey v. Phinney*, 2 John. 484.

³ *Steiger v. Hillen*, 5 Gill & J. 121.

⁴ *Sellman v. Bowen*, 8 Gill & J. 50; *Kiddall v. Trimble*, 1 Md. Ch. Dec. 143; s. c. 8 Gill, 207; *Chew v. Farmers Bk.*, 9 Gill, 361.

⁵ *Sellman v. Bowen*, 8 Gill & J. 50; *Kiddall v. Trimble*, 1 Md. Ch. Dec. 143. See *Steiger v. Hillen*, 5 Gill & J. 121.

⁶ *Sellman v. Bowen*, 8 Gill & J. 50; *Kiddall v. Trimble*, 1 Md. Ch. Dec. 143; s. c. 8 Gill, 207. See post, ch. xxvi., § 5.

⁷ *Layton v. Butler*, 4 Harring. 507.

⁸ *Nixon's Dig.* p. 209, § 3. See *Woodruff v. Brown*, 2 Harr. 246; *Hopper v. Hopper*, 2 Zab. 715; *Chiswell v. Morris*, 1 McCarter, Ch. 101.

⁹ 1 Rev. Stat. Misso. 1855, p. 673, § 26; *McClanahan v. Porter*, 10 Misso. 746. A purchaser on execution stands in the same position as a grantee directly from the husband. *Ibid.*

¹⁰ *Comp. Laws Kansas*, 1862, p. 480, § 17.

¹¹ *O'Ferrall v. Simplot*, 4 Iowa, 381. But arrears can not be recovered for a period exceeding six years. *Ibid.* Post, § 26.

¹² N. H. *Comp. Stat.* 1853, p. 521, § 4.

¹³ Rev. Stat. R. I. 1857, p. 504, § 5.

¹⁴ 1 Stat. Ill. 1858, p. 155, § 26; *Nicoll v. Ogden*, 29 Ill. 323.

¹⁵ *Winder v. Little*, 1 Yeates, 152. But see *Sharp v. Pettit*, 4 Dall. 212, and *Leggett v. Steele*, 4 Wash. C. C. 305.

¹⁶ *Ind. Rev. Stat.* 1843, p. 807; *Galbreath v. Gray*, 20 Ind. 290.

¹⁷ *Code Va.*, 1849, p. 475, § 11; *Tod v. Baylor*, 4 Leigh, 498; *Thomas v. Gammel*, 6 Leigh, 9.

¹⁸ 1 Rev. Stat. Ohio, p. 522, § 18.

recovery is limited to the damages accruing after the commencement of the suit; while in South Carolina,¹ where the husband has aliened, the courts award to the widow one-third of the annual interest on the purchase-money from the death of the husband to the time of the assessment.²

25. In Massachusetts, damages are recoverable from the time of a demand on one who was tenant of the freehold at the time of the demand; and not from the time of a demand on one who was the tenant at the death of the husband, but not when the demand was made.³ If an action be brought against a subsequent purchaser, damages are allowed only from the time of his purchase, and a separate action on the case may be maintained against the prior tenant to recover damages from the time of demand to the time of his conveyance.⁴

26. In Maine, the provisions of the Massachusetts statute above referred to have been substantially adopted.⁵ In a case where the demandant, after having recovered judgment, entered into an agreement with the warrantor of the tenant, that she would receive a specified sum yearly, during her life, in lieu of dower, it was held, that this agreement did not, after a neglect of payment, bar the right of the widow to recover possession by writ of entry; but that she was entitled to mesne profits only from the time that she made known in some form, her election to avoid the agreement.⁶

27. In Kentucky, before the revised statutes were adopted, it was repeatedly determined, that where the husband had conveyed his estate during the coverture, no damages could be recovered against the alienee, even from the commencement of the suit.⁷ A mere contract of sale, however, if the husband died without having executed a deed, did not exonerate the purchaser from liability for

¹ *Payne v. Payne*, Dudley, Eq. 124.

² See ante, § 3.

³ *Leavitt v. Lamprey*, 13 Pick. 382, (under stat. of 1828, c. 137, § 5); Gen. Stat. Mass. p. 697, §§ 4, 5.

⁴ 1 Washb. R. P., 2d ed., 231; Gen. Stat. Mass. c. 135, §§ 4, 5, 6. See *Stearns*, Real Act. 313.

⁵ Rev. Stat. Maine, 1857, p. 607, §§ 22, 23. See *Bolster v. Cushman*, 34 Maine, 428.

⁶ *Sargent v. Roberts*, 34 Maine, 135.

⁷ *Kendall v. Honey*, 5 Mon. 282; *Marshall v. Anderson*, 1 B. Mon. 198; *Garton v. Bates*, 4 B. Mon. 366; *Waters v. Gooch*, 6 J. J. Marsh. 588; *Golden v. Maupin*, 2 J. J. Marsh. 236, 240. But in *Mahoney v. Young*, 3 Dana, 588, the widow was permitted to recover against a purchaser from her husband, one-third of the rents that had accrued after the filing of her bill.

mesne profits; and in such case, the widow recovered one-third of the rents accruing from the commencement of the suit; and in equity, a sub-purchaser pending the action was required to account for such as accrued after his purchase.¹ And now, by the revised statutes,² a widow is entitled to recover damages against a purchaser from the time of the commencement of her action.³

28. In Alabama, it is settled, that in the courts of law, a widow can recover damages or mesne profits as against a purchaser, only from the time of the commencement of her suit;⁴ but in equity, damages are allowed on the ground of title, and she is there awarded interest upon the arrears.⁵ In *Johnson v. Elliott*,⁶ it was held, that where the grantee of the husband, after the death of the latter, receives the rents, the widow is entitled, in her proceeding for dower, to a decree for her proportion. A daughter, entitled under a covenant to stand seized, for love and affection, is not regarded as such a "purchaser," as to be exempt from a claim for mesne profits before a formal demand of dower.⁷

29. The revised statutes of New York, as we have seen,⁸ entitle the widow to damages only where the husband died seized, "to be estimated in a suit against the heirs of her husband from the time of his death; and in suits against other persons from the time of her demanding her dower of such persons."⁹ "A more necessary provision respecting damages as against the alienee of the husband," says Chancellor Kent,¹⁰ "is altogether omitted." In Michigan,¹¹ Wisconsin,¹² Minnesota,¹³ and Oregon,¹⁴ the law upon this subject is substantially the same as in New York.

Damages as against the alienee of the heir.

30. If the heir alien the lands after the husband's death, and

¹ *McElroy v. Wathen*, 3 B. Mon. 135.

² 2 Ky. Rev. Stat. by Stanton, p. 26, § 10.

³ *Yancy v. Smith*, 2 Met. (Ky.) 408.

⁴ *Beavers v. Smith*, 11 Ala. 20; *Springle v. Shields*, 17 Ala. 295; *Francis v. Garrard*, 18 Ala. 794.

⁵ *Beavers v. Smith*, 11 Ala. 20.

⁶ *Johnson v. Elliott*, 12 Ala. 112. See *Springle v. Shields*, 17 Ala. 295; *Francis v. Garrard*, 18 Ala. 794.

⁷ *Slatter v. Meek*, 35 Ala. 528.

⁸ Ante, § 5.

⁹ 1 Rev. Stat. N. Y., p. 742, § 20.

¹⁰ 4 Kent, 69.

¹¹ 2 Comp. Laws Mich., p. 854, § 25.

¹² Rev. Stat. Wis. 1858, p. 548, § 25. But see *Thrasher v. Tyack*, 15 Wis. 256.

¹³ Stat. Minn. 1858, p. 410, § 25.

¹⁴ Stat. Oregon, 1855, p. 408, § 25.

the widow recover dower against the alienee, she will be entitled to mesne profits and damages against him, to be computed from her husband's death; and it will be no excuse for him to say, that he has not been in possession of the premises during the whole of that period, because damages, including mesne profits, having been given to the widow when her husband died seized, she could only bring her writ of dower against the tenant of the freehold, which, in this case was the alienee of the heir.¹

31. Under the early New York statute, the widow, in an action against the alienee of the heir, was allowed to recover full damages from the death of her husband.² In chancery, if there were several terre-tenants, the damages were apportioned among them according to the time they had respectively enjoyed the premises.³ But now, by the revised statutes, in a suit against the alienee of the heir, damages are recoverable only from the time of the demand of dower.⁴ In such case, the widow is entitled to recover of the heir damages from the time of the death of her husband to the time of the alienation by the former, not exceeding six years in the whole; and the amount which she is entitled to recover from the heir is to be deducted from the amount she would otherwise be entitled to recover from his grantee, and any amount recovered as damages from the grantee must be deducted from the sum she would otherwise be entitled to recover from the heir.⁵ These provisions of the New York statute have been re-enacted in Michigan,⁶ Wisconsin,⁷ Minnesota,⁸ and Oregon.⁹ A similar rule is in force in Massachusetts,¹⁰ Maine,¹¹ New Hampshire,¹² and Rhode Island.¹³

32. In Pennsylvania, the doctrine of the English courts is adhered to, and it is held, that the demandant, where the husband died seized, is entitled to recover damages from the tenant for the time being, from the time of the husband's death, although the defendant may have been in possession but a portion of the

¹ 1 Roper, H. & W. 440; *Belfield v. Rowse*, Co. Litt. 33 a.; Mo. 80; 4 Leon. 198; Bull. N. P. 117; Stearns, Real Act. 312.

² *Hitchcock v. Harrington*, 6 John. 290.

³ *Hazen v. Thurber*, 4 John. Ch. 604.

⁴ 1 Rev. Stat. N. Y., p. 742, § 20.

⁵ 1 Rev. Stat. N. Y., p. 743, § 22.

⁶ 2 Comp. Laws Mich., p. 854, §§ 25, 27.

⁷ Rev. Stat. Wis. 1853, p. 548, §§ 25, 27. See *Thrasher v. Tyack*, 15 Wis. 256.

⁸ Stat. Minn. 1858, p. 410, §§ 25, 27.

⁹ Stat. Oregon, 1855, p. 408, §§ 25, 27.

¹⁰ Gen. Stat. Mass., ch. 135, §§ 4, 5, 6. See ante, §§ 11, 25.

¹¹ Rev. Stat. Maine, 1857, p. 607, § 23.

¹² N. H. Comp. Stat. 1853, p. 521, § 4.

¹³ Rev. Stat. R. I. 1857, p. 504, § 5.

time.¹ So in Missouri;² and in that State, a purchaser under a sale made by order of court after the death of the husband, is liable to the same extent as a purchaser from the heir.³ So in Kansas,⁴ Virginia,⁵ Kentucky,⁶ and New Jersey.⁷ In Delaware, as against the alienee of the heir, damages can be recovered only from the time his title accrued.⁸ In Illinois, from the time of a demand;⁹ and in Ohio, from the date of the commencement of the suit.¹⁰

33. In a case¹¹ in Indiana, A. died the owner of a building, part of which was used for a dry goods store, and the residue for a dwelling. The widow continued in the dwelling, and the heirs leased the store room to B. The whole building having been afterwards set off to the widow for her dower, she brought suit against B. for the rent which had accrued for the use of the store room before her dower was assigned. It was held, that the action would not lie. The court said: "The right to occupy the dwelling did not extend to the store room. It was not appropriated to, nor in any way necessary for, the use or convenience of the dwelling-house. The fact that it was, on demand of dower in her husband's real estate, set off to her, gave her no right of action for previous use and occupation by tenants of the heirs. Her remedy would be in damages against the heirs for detention of her dower."

34. As a purchaser from the heir can not aver that he was in possession of the estate during all the period which elapsed after the husband's death, and therefore is unable to show that he had the power of assigning dower at all times during that period, he is not permitted to avail himself of the plea *tout temps prist*.¹² This doctrine has been applied to a case determined in New Jer-

¹ Seaton v. Jamison, 7 Watts, 533; Sandback v. Quigley, 8 Watts, 460, 462; Lyle v. Richards, 9 Serg. & R. 368. See Jones v. Patterson, 12 Pa. St. 149.

² 1 Rev. Stat. Misso. 1855, p. 673, § 26; Rankin v. Oliphant, 9 Misso. 239.

³ Rankin v. Oliphant, *supra*. ⁴ Comp. Laws Kansas, 1862, p. 480, § 17.

⁵ Code Va. 1849, p. 475, § 11. But a recovery can not be had for a longer period than five years. *Ibid*.

⁶ 2 Ky. Rev. Stat. by Stanton, p. 26, § 10. The same limitation as to the extent of the recovery exists in this State as in Virginia. *Ibid*.

⁷ Nixon's Dig., p. 209, § 3.

⁸ Newbold v. Ridgway, 1 Harring. 55; Green v. Tennant, 2 Harring. 336.

⁹ 1 Stat. Ill. 1858, p. 155, § 26.

¹⁰ 1 Rev. Stat. Ohio, p. 522, § 18.

¹¹ Williamson v. Ash, 7 Ind. 495.

¹² Park, Dow. 305; 1 Roper, H. & W. 445; Co. Litt. 33 a.; 2 Bac. Abr. 392. And see 1 Keb. 87.

sey.¹ And in Missouri, if the husband die seized, a purchaser under a judicial sale made after his death can not plead *tout temps prist*.²

Measure of damages where there is an outstanding term for years.

35. If the lands were leased for years before the marriage, the widow will recover dower, not according to the value of the land, but according to the rent;³ and it follows, that if the rent reserved was only a nominal one, no damages, or none but such as are merely nominal, can be recovered.⁴ The case of *Hitchens v. Hitchens*,⁵ illustrates this point. There, the husband's father devised, that in case of a deficiency of personal property to pay debts and legacies, his executors should pay the same out of the rents and profits of his real estate; and, when debts and legacies were paid, devised his real estate to his son in tail, with remainders over. The executors entered on the real estate, and the son died before the debts were paid, and before he had any possession, and his widow recovered her dower in the mayor's court, and 227*l.* for damages. She afterwards instituted a suit in the court of chancery to have a mortgage term set aside, and for other purposes; and on a cross bill brought by the devisee of the lands and the executors, to set aside the recovery of damages, it was admitted by the Lord Keeper that the damages were carried too far back; she having recovered the value from the death of her husband; whereas she ought to have had damages but from the time the debts were paid and trusts performed, and the verdict was set aside accordingly.

Instances in which damages are not recoverable.

36. No damages can be recovered under the statute of Merton on a writ of right of dower,⁶ because damages can only be given

¹ *Woodruff v. Brown*, 2 Harr. 246. See ante, § 18; *Sandback v. Quigley*, 8 Watts, 460, 462.

² *Rankin v. Oliphant*, 9 Misso. 239.

³ *Hargr. Co. Litt.* 32 b., 33 a., note (5). In *Winch*, 80, in a case where the lands were let for years, rendering rent, it is said, this doth save to the tenant damages; but it is in all probability a mistake of the reporter. It is obvious, that if the widow was dowable of the rent, she is as much entitled to damages for the detainer of that, as if she were dowable of the land. *Park, Dow.* 306, note. See ante, § 6; vol. i., ch. xxvi., § 21.

⁴ *Chase's case*, 1 Bland, Ch. 206, 231.

⁵ *Hitchens v. Hitchens*, 2 Vern. 404.

⁶ *Co. Litt.* 32 b.; 1 Keb 86, arg.

for the detention of possession; and in writs of right, where the right itself is disputed, no damages are given, because no wrong is done until the right is determined.¹ So, if the heir, or his alienee, assign dower, and the widow accept thereof, she can not afterwards claim damages; because, having accepted the dower, which is the principal, she can not afterwards sue for damages, which are only accessory.²

37. In the United States, the distinction in the English practice above noticed between a recovery on a writ of right of dower and on a writ of dower *unde nihil habet*, does not seem to be regarded, and damages are given without reference to the form of the action, as well where the right of the widow is disputed as where it is not denied.³

Demand of dower.

38. The widow's title is so highly favored in law, that her demand of endowment, without an express refusal on the part of the tenant, will be sufficient to entitle her to damages and costs.⁴ In *Corsellis v. Corsellis*,⁵ upon a trial at bar, the issue was, whether there was a demand of dower and refusal, to entitle the plaintiff to damages. The plaintiff proved an actual demand of the heir, who was of the age of fourteen years, and then in her custody; though by his father's will committed to another person. The infant said his guardian would not let him assign dower. It was resolved unanimously upon debate, 1st, that dower was demandable of the heir, though he was under age; 2d, that his guardian was but in the nature of a guardian in socage, and that the dower was not demandable of him, but of the heir,⁶ though not in the custody of the guardian; and that if the heir had entered upon the land to assign dower, he would not be a trespasser upon the guardian, though the custody of the land was committed to such guardian during the infancy of the heir; 3d, that the neglect of the heir in not assigning dower upon demand, though he did not actually refuse to do it, was such a refusal in law as to entitle the widow to damages.⁷

¹ 1 Cruise, Dig. 169.

² Park, Dow. 309; Co. Litt. 33 a.; 1 Cruise, Dig. 170; Fitzh. N. B. 148, n.; Gilb. Dow. 375.

³ Although an assignment of dower be refused in good faith, under the supposition that no right thereto exists, the widow is nevertheless entitled to damages for the delay. *Nicoll v. Ogden*, 29 Ill. 323.

⁴ 1 Roper, H. & W. 445.

⁵ *Corsellis v. Corsellis*, Bull. N. P. 117; 1 Cruise, Dig. 169.

⁶ In the United States a guardian may assign dower. Ante, ch. iv.

⁷ Park, Dow. 303. In several of the American States a demand of dower is

Method of ascertaining the damages.

39. The statute of Merton, in giving damages, has left the method of ascertaining them to the court; and in England the usual practice is, unless the damages are admitted by the party, or ascertained by the jury who try the action, to grant a writ of inquiry;¹ and if judgment be given for the demandant by default, confession, or in any other way than by verdict, there must of necessity be a jury impannelled to assess the damages.² In these cases a writ of inquiry of damages issues, commanding the sheriff to inquire whether the husband died seized; and if he did, what value the lands are by the year, and how long it is since the husband died; and upon return of the inquisition judgment is entered for the damages.³ And upon damages being adjudged, they shall be recovered against the tenant to the writ *in toto*, notwithstanding there may have been several in receipt of the profits successively since the death of the husband, and not against every one for his time, as in cases of disseizin,⁴ for the statute of Gloucester does not extend to this case.⁵

40. Where the widow recovers in her suit, and the jury who try the case pass upon the question of damages, their verdict should find the following particulars: 1st, that the husband died seized; 2dly, the yearly value of the lands or tenements; 3dly, the damages which she has sustained from the detention of her dower. But if any of these requisites be imperfectly found, or are omitted by the jury, the defect may be remedied by the award of a writ of inquiry, as above stated.⁶ And in the English courts, as we have seen,⁷ if the value *de tempore mortis*, and the damages *occasione detentionis dotis*, be mixed in the verdict, and not assessed separately, the assessment will nevertheless be good.⁸

essential to a right of action for its recovery. See further upon this subject ante, ch. vi.

¹ *Kent v. Kent*, 2 Barn. 442; *Hargr. Co. Litt.* 32 b., note (4). And see 2 Towns. Judg. 100, 101, pl. 22, 23; *Ibid.* 102, pl. 24.

² 1 Keb. 85, marg. And see *Rast. Ent.* 238 a., 238 b.

³ *Rast. Ent.* 238 a., 238 b.; *Dennis v. Dennis*, 2 Saund. 331.

⁴ See 1 Keb. 86, marg.; *Belfield v. Rowse*, Mo. 80; *N. Bendl.* 153; *Co. Litt.* 33 a.; *Brown v. Smith*, Bull. N. P. 117.

⁵ *Park, Dow.* 307.

⁶ *Butler v. Ayres*, 1 Leon. 92. See *Barnett v. Barnett*, 16 S. & R. 51, 55.

⁷ Ante, § 8.

⁸ 1 Roper, H. & W. 441. See note 4 to *Co. Litt.* 32 b.; ante, § 13.

41. In Massachusetts, the damages are ordinarily found by the jury which tries the case. If judgment be rendered by default, the damages may be assessed by the court, with the assent of the demandant, or the matter may be referred to a jury, or by agreement of parties, they may be assessed by the commissioners appointed to assign dower.¹ In Maine, if the demandant recover judgment for her dower, she recovers damages for its detention in the same action;² and the whole question is left to the jury, to be determined by them upon the evidence, under proper instructions from the court.³ It has been held, that where a widow has recovered judgment for dower and damages, she can not afterwards maintain a separate action against the tenant for the use of the premises from the date of the verdict in her favor to the time of the actual assignment of dower.⁴ But by the present statute, the damages are to be computed to the time of the commencement of the suit for dower, and a recovery for the subsequent damages may be had in a separate action.⁵

42. In New Jersey, in case of a judgment by default, the demandant, if she seek to recover damages under the statute, must suggest upon the record that her husband died seized, or that she had demanded her dower; and thereupon a writ of inquiry will be awarded to inquire as to the truth of such suggestion. If the jury find that the husband died seized, they must find, also, the time when he so died; of what estate; and the annual value of the land, and damages. But if the husband did not die seized, then there should be no finding as to the damages, but only of the value of the land.⁶ The writs of seizin and of inquiry are generally blended or united in the same writ.⁷ In Pennsylvania, a similar course is pursued.⁸

43. In North Carolina, dower, and damages for its detention, are to be prayed for and recovered in the same proceeding. If the

¹ Stearns, Real Act. 311; 1 Washb. R. P., 2d ed., 232; *Perry v. Goodwin*, 6 Mass. 498; Gen. Stat. Mass. p. 697, §§ 4-7.

² Rev. Stat. Maine, 1857, p. 607, § 22.

³ *Purington v. Pierce*, 41 Maine, 529.

⁴ *Ibid.*

⁵ Rev. Stat. Maine, 1857, p. 607, § 22.

⁶ *Martin v. Martin*, 2 Green (N. J.), 125. See *Young v. McPherson*, 2 Penning. 895.

⁷ *Ibid.*

⁸ *Benner v. Evans*, 3 Penn. (Penr. & W.) 454. See *Barnett v. Barnett*, 16 S. & R. 51, 55.

petition contain a prayer for damages, the court will order an issue to be made up between the widow and heir, and submitted to a jury.¹ In Tennessee, it is held, that under the statute of 1784,² if the right to dower is disputed, a jury must be impannelled to try it, and the damages are to be assessed by the jury. If the right be not disputed, and the widow claim damages, and the claim is not admitted, a writ of inquiry must be awarded to ascertain them. If the dower be assigned, and no damages are assessed or awarded to her in the proceeding, the right to recover damages is for ever gone. If a separate and distinct action would lie to recover damages after an assignment of dower, it should be brought against the tenant of the freehold, whose duty it was to assign dower, and not against a tenant for years.³

44. In a case⁴ in Kentucky, it was said, that at common law, a suit for dower was considered as ended by the judgment for seizin; and the damages were added by the statute of Merton only when the husband died seized; and hence, though personal notice was not necessary in order to obtain a judgment for dower,⁵ an inquisition of damages was illegal, unless the tenant had personal notice of the time of executing the writ of inquiry. It was decided in the same case, that the common law mode of suggesting on the record that the husband died seized, and of notifying the tenant of the time of holding the inquisition in the country, was inappropriate to that State. That in writs of dower, there should be no inquiry of damages by default unless the count allege, in effect, that the husband died seized.⁶

45. In Indiana, it has been held, in a proceeding to obtain an assignment of dower and damages for withholding it, that if the defendants, after having pleaded in bar, on being called, fail to appear, the plaintiff may have the damages assessed in the same manner as if they had appeared and defended.⁷ In Wisconsin, in an action to recover dower under the statute, a verdict was rendered

¹ *Whitehead v. Clinch*, 1 Murph. L. & Eq. 128; s. c. 2 Hay. 240; *Sutton v. Burrows*, 2 Murph. 79.

² Stat. 1784, c. 2, § 9.

³ *Thompson v. Stacy*, 10 Yerg. 493. See post, ch. xxvi., §§ 13, 14.

⁴ *Waters v. Gooch*, 6 J. J. Marsh. 586.

⁵ Ante, ch. v. It has been decided in Maryland, that it is not necessary to lay damages in the declaration. *Keefer v. Young*, 2 H. & J. 53.

⁶ See, also, *Taylor v. Brodrick*, 1 Dana, 345.

⁷ *Kirby v. Holmes*, 6 Ind. 33.

against three defendants, assessing damages for withholding dower. A judgment for the damages against one of the defendants only, was declared to be erroneous.¹

46. In Florida, the court, upon application, will refer the case to a master to state an account, and ascertain the widow's share of the mesne profits. The commissioners appointed under the provisions of the statute to assign dower, have no authority to assess the damages.² But in Ohio, the statute directs, that the commissioners who set off the dower, shall also estimate the net annual value of the rents and profits, from the time of the commencement of the suit, and that one-third of the amount so ascertained, shall be adjudged to the widow.³

47. In Illinois, the damages may be assessed by the court; or, if required, a jury may be impannelled for that purpose.⁴ Where land is not susceptible of a division, and a jury is impannelled to ascertain its yearly value, such jury is required to assess the damages which have accrued down to the time of the rendition of the verdict.⁵ In Missouri,⁶ and Kansas,⁷ when any report assigning dower is approved, a jury is impannelled to assess the damages. In Arkansas, if the land assigned for dower be deforced from the possession of the widow, she may bring her action for its recovery, with double damages: or she may sue for the damages alone, and recover the actual damages sustained from time to time until she is put in possession of her dower.⁸

Distinction between the judgment for dower and the award of damages.

48. The judgment for dower of a third part of the lands by metes and bounds, being founded on the common law, and the award of damages on the statute of Merton, are separate and distinct judgments. Hence, an act of the widow which may deprive her of the benefit of the one, may not, in the least degree, prejudice her interest in the other.⁹ If, therefore, a widow release to the tenant

¹ Thrasher v. Tyack, 15 Wis. 256.

² May v. May, 7 Florida, 207. See Thompson's Dig. p. 186.

³ 1 Rev. Stat. Ohio, p. 522, § 18.

⁴ 1 Stat. Ill. 1858, p. 155, § 26.

⁵ 1 Stat. Ill. 1858, p. 156, § 28.

⁶ 1 Rev. Stat. Misso. 1855, p. 676, § 34. See § 36.

⁷ Comp. Laws Kansas, 1862, p. 482, § 23. See § 25.

⁸ Dig. Stat. Ark. 1858, p. 457, § 49.

⁹ 1 Roper, H. & W. 441.

damages *occasione detentionis dotis*, it will not bar her right to the mesne profits.¹ And upon the same principle, the first judgment of seizin in favor of the widow may be confirmed upon a writ of error, before the second judgment is given for damages;² and the second judgment may be reversed without prejudice to the first, so that the judgment intended by the statute of Merton is not the first, but the second.³

49. It has been held in Delaware, in conformity to the English doctrine, that a judgment for damages may be reversed and a judgment for dower affirmed.⁴ In a case in Maryland, judgment for dower as claimed, was confessed by the defendant. A writ of *habere facias seisinam* issued, and the dower was laid off. On the return of the writ the court entered judgment for nominal damages and costs. On appeal, the judgment for damages and costs was reversed.⁵ In Pennsylvania, if the verdict be for both dower and damages, when no damages are recoverable, the court will treat the finding as to the damages as surplusage, and render judgment for the dower.⁶ So if the jury find "for the plaintiff her dower as stated in the declaration," but omit to find that the husband died seized, and the court thereupon enter judgment that a writ of seizin and inquiry of damages issue, the plaintiff may release all but the judgment to recover seizin, and that may stand.⁷ In Kentucky, in a case where the declaration contained nothing to entitle the demandant to damages, it was held to be irregular to take a writ of inquiry upon a judgment by default; but as the verdict was for dower only, and not for damages, the proceedings on the writ of inquiry were disregarded, and the judgment for dower sustained.⁸

Death of demandant pending the proceeding.

50. If the demandant die before the damages are ascertained, the right to them is entirely lost, and there can be no recovery by the executor. Nor does it make any difference in such case that

¹ *Harvey v. Harvey*, T. Raym. 366; *Butler v. Ayres*, 1 Leon. 92. See ante, § 13.

² 1 Lev. 38.

³ 2 Stra. 971-973; Hargr. Co. Litt. 32 b., note 4; 1 Roper, H. & W. 441; Park, Dow. 308; 1 Washb. R. P., 2d ed., 232-3. And see 2 Raym. 1385, arg.

⁴ *Layton v. Butler*, 4 Harring. 507.

⁵ *Hammond v. Higgins*, 2 H. & J. 413.

⁶ *Shirtz v. Shirtz*, 5 Watts, 255. See, also, *Sharp v. Pettit*, 4 Dall. 212; *Williams v. Guiger*, 3 Yeates, 38.

⁷ *Barnett v. Barnett*, 16 S. & R. 51.

⁸ *Taylor v. Brodrick*, 1 Dana, 345.

the tenant had entered into a recognizance upon bringing a writ of error, to pay the damages and costs if the judgment should be affirmed.¹

51. Thus, in Massachusetts it has been determined, that if the demandant die after she has recovered judgment for her dower, but before it has been set out to her, the action dies with her, and judgment for damages can not be rendered as of a former term.² So, where the demandant died after judgment but before a writ of seisin had issued, it was held that the whole proceeding died with her.³ In a case in Maine, the widow died pending her suit, and the court refused to permit judgment to be entered as of a term anterior to her decease.⁴ Similar decisions have been made in Pennsylvania,⁵ Ohio,⁶ and Illinois.⁷

52. But in several of the States this rule of the common law has been changed by statute. Thus, in Maine, since the decision of the case noticed in the preceding section, a provision has been adopted, to the effect that if the demandant die during the pendency of her action, her executor or administrator may prosecute the same to final judgment and recover therein the damages to which she would be entitled to the time of her decease; or he may, at his option institute a new action.⁸ So, by recent statute in Ohio, if the widow die pending her proceeding for dower, the action may be revived in the name of her executor or administrator, and a decree rendered for the mesne profits accruing from the date of the filing of the petition to the time of her death.⁹ Similar enactments are in force in Virginia¹⁰ and Kentucky.¹¹ So, in Missouri¹² and

¹ *Mordant v. Thorold*, Carth. 133; 1 Salk. 252; 1 Show. 97; 3 Mod. 281; 3 Lev. 275; Rep. temp. Holt, 305; Park. & Dow. 309. But in equity a different rule prevails. See post, ch. xxvi., §§ 21, 22.

² *Atkins v. Yeomans*, 6 Met. 438.

³ *Hildreth v. Thompson*, 16 Mass. 191.

⁴ *Rowe v. Johnson*, 19 Maine, 146.

⁵ *Sandback v. Quigley*, 8 Watts, 460; *Conklin v. Bush*, 8 Barr, 514. But the administrator of the widow may recover mesne profits in equity. *Paul v. Paul*, 36 Pa. St. 270.

⁶ *Miller v. Woodman*, 14 Ohio, 518. See, also, *Harper v. Archer*, 28 Missis. 212.

⁷ *Turney v. Smith*, 14 Ill. 242. In this case the action was against the alienee of the husband.

⁸ Rev. Stat. Maine, 1857, p. 607, § 24.

⁹ Act of Feb. 12, 1863; 60 Ohio L., p. 10.

¹⁰ Va. Code, 1849, p. 475, § 11.

¹¹ 2 Rev. Stat. Ky. by Stanton, p. 26, § 10.

¹² 1 Rev. Stat. Misso. 1855, p. 679, §§ 49-52.

Kansas,¹ the action may be prosecuted in the name of the personal representative of the widow where her death occurs after it has been commenced; and in these States, if she die before a suit has been instituted, an action may be maintained by the representative to recover her proportion of the rents and profits.

53. In a case in partition, in New Jersey, where, after a sale of the premises, the widow, who was entitled to dower therein, had agreed in writing under her hand and seal, according to the statute of that State, to accept in lieu of her dower such sum in gross as the chancellor should deem reasonable, but died before distribution, it was held that her right to receive a sum in gross had vested, and was not divested by her death, but that her interest should go to her children.² In such case, however, if the widow die before a sale of the premises, her estate is thereby determined.³

Death of the tenant.

54. If the first judgment be merely that the widow shall recover seizin, and which is done and executed; and the tenant die before the second judgment is obtained for damages under the statute of Merton, they are gone by his death, and no *scire facias* will lie against his heir to obtain a writ of inquiry of them, because they are considered a personal demand, and like damages in trespass, if they be not recovered during the life of the party, they die with him.⁴

55. Yet an instance may occur in which the tenant's death will not deprive the wife of her right to damages. Thus, if her demand be against two tenants of the freehold, and she recover judgment for her dower, damages and costs against both of them; if one of them die, the survivor will be answerable to the widow for the whole of the damages and costs, because both tenants are considered joint trespassers.⁵

56. In Missouri,⁶ and Kansas,⁷ it is provided, that no action for

¹ Comp. Laws Kansas, 1862, p. 485, §§ 38-41.

² Mulford v. Hiers, 2 Beas. Ch. 13.

³ Ibid.

⁴ Aleway v. Roberts, 1 Sid. 188; 1 Lev. 38; 1 Keb. 85, 171, 646, 711; Whitehead v. Clinch, 2 Murph. Law & Eq. 128; s. c. 2 Hay. 240; 1 Roper, H. & W. 442; Park, Dow. 308. See post, ch. xxvi., § 20.

⁵ Kent v. Kent, 2 Stra. 971; Ca. temp. Hardw. 50; Ridgway, 21; 2 Barnard. 357, 386, 441; 1 Roper, H. & W. 442.

⁶ 1 Rev. Stat. Misso. 1855, p. 679, § 50.

⁷ Comp. Laws Kansas, 1862, p. 485, § 39.

dower shall abate by the death of either party. In Virginia,¹ and Kentucky,² if, after suit brought the tenant die before recovery, the damages may be recovered against his representative. In Rhode Island, no action of dower abates by the death of the defendant where he is tenant of the freehold, if the property pass from him by descent or devise; but such death being suggested, the heir or devisee may be summoned to appear and take upon himself the defence of the suit; and the action shall proceed against him in the same manner as if he had been the original defendant.³

The statute of limitations as affecting the recovery of damages.

57. By the late English statute of limitations, no arrears of dower, or damages on account of such arrears, are to be obtained by any action for a longer period than six years before the commencement of the action.⁴ A similar provision is in force in New York,⁵ Michigan,⁶ Wisconsin,⁷ Minnesota,⁸ Oregon,⁹ and Iowa.¹⁰ In Virginia,¹¹ and Kentucky,¹² no recovery can be had for a period exceeding five years. In Maryland, an alienee of the husband who receives the rents after the death of the latter, is regarded in equity as a trustee or bailiff to the extent of the widow's claim, and can not defeat an action by her to recover her proportion of the amount so received by pleading the statute of limitations.¹³ But if the widow be guilty of laches, and delay her proceeding for many years, without being able to assign a satisfactory reason therefor, her claim will be barred.¹⁴

Improvements by the purchaser excluded from the estimate of damages.

58. In estimating the damages to be awarded to the widow, the general rule is, that improvements made by a purchaser after the

¹ Code Va. 1849, p. 475, § 11. ² 2 Rev. Stat. Ky. by Stanton, p. 26, § 10.

³ Rev. Stat. R. I. 1857, p. 505, § 15. ⁴ 3 & 4 Will. IV., ch. 27, § 41.

⁵ 1 Rev. Stat. N. Y., p. 742, § 20; p. 743, § 22; Bell v. Mayor N. Y., 10 Paige, 70;

⁴ Kent, 69. See Van Gelder v. Post, 2 Edw. Ch. 577.

⁶ 2 Comp. Laws Mich., p. 854, § 27. ⁷ Rev. Stat. Wis. 1858, p. 548, § 27.

⁸ Stat. Minn. 1858, p. 410, § 27. ⁹ Stat. Oregon, 1855, p. 408, § 27.

¹⁰ O'Ferrall v. Simplot, 4 Iowa, 381; Rev. 1860, § 3576.

¹¹ Code Va. 1849, p. 475, § 11.

¹² 2 Rev. Stat. Ky. by Stanton, p. 26, § 10.

¹³ Sellman v. Bowen, 8 Gill & J. 50.

¹⁴ Steiger v. Hillen, 5 Gill & J. 121; Kiddall v. Trimble, 8 Gill, 207; Chew v. Farmers Bank, 9 Gill, 361.

husband ceased to be the owner of the estate, are not to be taken into the account.¹

Improvements by the heir.

59. In a case in equity in New York,² it was held, contrary to the doctrine of the common law,³ that improvements made after the death of the husband, should be excluded from the estimate of value in ascertaining the damages. And by the revised statutes of that State, damages are not to be allowed for the use of any permanent improvements made after the death of the husband, by his heirs, or by any other person claiming title.⁴ The law is the same in Ohio,⁵ Michigan,⁶ Wisconsin,⁷ Minnesota,⁸ and Oregon.⁹

Costs.

60. If damages are obtained upon a verdict in dower, the statute of Gloucester¹⁰ gives the demandant costs; but if no damages are given, the demandant, although she obtained judgment for her dower, must pay her own costs.¹¹

61. In Pennsylvania,¹² and New Jersey,¹³ no costs are recovered by the widow in cases where the husband did not die seized. But if she recover damages, she is entitled to a judgment for costs.¹⁴ In South Carolina, costs follow the judgment for dower, as in other cases.¹⁵ In many of the States, provision is made by statute for apportioning the costs among the parties according to their respective interests in the estate.

¹ 4 Kent, 69; *Hazen v. Thurber*, 4 John. Ch. 604; *Stearns v. Swift*, 8 Pick. 532; *Carter v. Parker*, 28 Maine, 509; *Winder v. Little*, 1 Yeates, 152; *Van Dorn v. Van Dorn*, 2 Penning. 513; *Francis v. Garrard*, 18 Ala. 794; 1 Rev. Stat. Ohio, p. 522, § 19; ante, ch. xxii. But see *Sellman v. Bowen*, 8 Gill & J. 50; Va. Code, 1849, p. 475-6, §§ 10-12.

² *Hazen v. Thurber*, 4 John. Ch. 604.

³ See ante, ch. xxi., §§ 30-34.

⁴ 1 Rev. Stat. N. Y. p. 743, § 21.

⁵ 1 Rev. Stat. Ohio, p. 522, § 19.

⁶ 2 Comp. Laws Mich. p. 854, § 26.

⁷ Rev. Stat. Wis. 1858, p. 548, § 26.

⁸ Stat. Minn. 1858, p. 410, § 26.

⁹ Stat. Oregon, 1855, p. 408, § 26.

¹⁰ 6 Edw. I., c. 1, § 2. See vol. i., ch. i., § 25.

¹¹ *Park, Dow*. 310.

¹² *Benner v. Evans*, 3 Penn. (Pen. & W.), 454; *Sharp v. Pettit*, 4 Dall. 212.

¹³ *Fisher v. Morgan*, Cox, 125; *Sheppard v. Wardell*, Ibid. 452; *Martin v. Martin*, 2 Green, 125. See *Young v. McPherson*, 2 Penning. 815.

¹⁴ *Martin v. Martin*, 2 Green (N. J.), 125.

¹⁵ *Smith v. Paysinger*, 2 Mill, 59; *Vance v. Becknall*, 1 Bail. 140.

Damages on proceedings in error.

62. The statute of Merton, in giving damages to the widow, was introductive of a new law; the method, therefore, prescribed in it was to be particularly observed. The Act, as we have seen, authorizes courts of law to award damages to the effectual judgment for the recovery of seizin in the court where the writ of dower is brought. Hence, if the tenant issued a writ of error upon a judgment obtained against him for dower, damages, and costs, the court of error could not, under the Act, give additional damages from the writ of error to the affirmance of the judgment.¹ To remedy this inconvenience, the legislature interposed, and by an Act passed in the reign of Charles II.,² it is declared, that in writs of error to be brought upon any judgment after verdict, or in any action of ejectment, no execution shall be stayed unless the plaintiff in error³ become bound to pay such damages and costs as shall be awarded, in case the judgment be confirmed, or the plaintiff discontinue, or be nonsuited;⁴ and that the court below, upon the affirmance of such judgment, &c., shall issue a writ of inquiry to ascertain the mesne profits and damages by waste after the first judgment, and upon return of the writ, shall give judgment and award execution for them, and also for the costs of the suit.⁵

63. Mr. Roper observes,⁶ that, “since the passing of the above statute, the plaintiff in error enters into a recognizance with sureties, to answer in damages and costs; and if the judgment be affirmed, the defendant may recover his costs singly by an action upon the recognizance; and he may at the same time have a writ of inquiry to ascertain the mesne profits, and the court will not stay the proceedings for recovery of the costs till the costs and mesne profits are ascertained and paid.”⁷

64. The same writer adds:⁸ “The recognizance required by the Act may have the effect of rendering persons liable to the widow for damages and costs, upon whom she would otherwise have no claim. An instance of this occurred in *Kent v. Kent*.⁹ In that

¹ Ca. temp. Hardw. 50; Park, Dow. 309.

² 16 & 17 Car. II., c. 8, §§ 3, 4.

³ See *Barnes v. Bulwer*, Carth. 121.

⁴ See *Glefold v. Carr*, Br. & Golds. 127, that a writ of error can not be brought by the tenant to a writ of dower before the damages found.

⁵ See Park, Dow. 310, 311.

⁶ 1 Roper, H. & W. 443.

⁷ *Doe v. Roach*, Ca. temp. Hardw. 373.

⁸ 1 Roper, H. & W., 443, 444.

⁹ *Kent v. Kent*, 2 Stra. 971; Ca. temp. Hardw. 50; Ridgway, 21; 2 Barnard. 357, 386, 441.

case, the widow obtained judgment for her dower, with damages and costs, against two tenants of the freehold, who brought a writ of error; and whilst the writ was pending, one of them died. The writ having abated by that event, the heir of the deceased, and the surviving tenant, joined in a new writ of error, and both of them entered into the usual recognizance to pay damages and costs, if the judgment should be confirmed, which finally happened. This undertaking of the heir was held to subject him, equally with the surviving tenant, to the damages and costs, which circumstance, with others, vitiated the judgment in error, that charged the surviving tenant singly with the payment of those costs and damages."

65. A statute in Kansas provides, that where an appeal is taken in an action for dower, from a judgment in favor of the widow, the appellant shall become bound in a recognizance to pay not only all damages which have been assessed against him, but all which may be subsequently adjudged to the widow; and when any such judgment is affirmed, a writ issues to inquire of the mesne profits and damages by waste after the first judgment.¹

*The statute of Merton extends to proceedings in chancery.*²

66. The statute of Merton extends to assignments of dower under decrees of courts of equity. There is a passage in Lord Coke's commentary upon the 36th section of Littleton to the effect, "that if the wife have dower assigned to her in chancery, she shall have no damages;" but this is to be understood as alluding to the writ *de dote assignanda* issued by that court, and not to a decree of a court of equity; and the reason why no damages are recoverable upon that writ is, that the widow is not deforced of dower.³

¹ Comp. Laws Kansas, 1862, p. 486, § 43.

² See post, ch. xxvi.

³ 1 Roper, H. & W. 438; 2 Bro. C. C. 631. And see Bro. Dam. pl. 195. For the nature of the writ, see Fitzh. N. B. 263, (C).

CHAPTER XXVI.

RECOVERY OF MESNE PROFITS IN A COURT OF EQUITY.

§ 1-3. Views of English text writers.	20. Death of defendant pending the suit.
4-14. Cases in the American courts.	21, 22. Death of the widow before dower has been assigned.
15-18. Interest on arrears.	
19. Widow not entitled to an allowance <i>pendente lite</i> .	

Views of English text writers.

1. SOME difference of opinion has existed in England as to the extent of the widow's right to mesne profits in a court of equity. Upon this subject Mr. Roper remarks: "It has been said that mesne profits will be decreed to the widow in equity in instances only where she has demanded dower in analogy to the rule of law and the construction of the statute of Merton before considered;¹ and a case of *Delver v. Hunter*,² has been cited to that effect; as also to prove that there shall be no mesne profits decreed except where the husband dies seized of the lands as required by the same statute. This doctrine, however, seems to be open to objection; for it is presumed that courts of equity do not in this instance proceed either upon the statute of Merton, or with reference to any legal rule in decreeing to the widow mesne profits; the principle which they adopt appears to be the title of the widow to endowment immediately upon the death of her husband; this right drawing to it an account of the profits of her share received by the person whose duty it was to have assigned dower, so that such person incurs a debt to the widow which he in his lifetime, or his representative after his death, is considered in equity as liable to discharge. In addition to this it may be remarked, that the tenant may probably be considered in equity as holding the widow's one-third of the estate, as her trustee or bailiff, from the death of her husband, and therefore answerable to her for his receipt of rents in respect of that proportion of the property. Under all the circumstances, and the favorable disposition of courts of equity to extend the rights of the

¹ See ante, ch. xxv.

² *Delver v. Hunter*, Bunb. 57.

widow beyond her title at law,¹ it is conceived, notwithstanding the case of *Delver v. Hunter* (reported in a book of little authority, and said by Lord Mansfield² to consist of very loose notes, and never intended to be published), that in respect to mesne profits in dower, the widow's right to an account of them in equity may be enforced either against the heir or alienee, or their representatives, without regard to any previous demand by the widow for endowment, or to the circumstance whether her husband died seized, or not; the title to mesne profits being inseparably attached to the right of endowment of one-third part of the estate."³

2. In a note appended to this text, Mr. Jacob, says:⁴ "The remarks attributed to Lord Hardwicke,⁵ and those of Lord Alvanley, in *Curtis v. Curtis*,⁶ imply that a dowress may have a larger relief, in respect of mesne profits, in equity than at law. But the passage in *Atkins* is, as observed,⁷ founded on a misconception of the right to damages at law. And the decision in the case of *Curtis v. Curtis*, turned only upon the ordinary principle of equity, that the decree is to be made according to the rights of the parties as they exist at the institution of the suit; the death of the parties during the suit did not therefore alter the right;⁸ and on this ground Lord Alvanley distinguished the case from that of the heir dying before the filing of the bill.⁹ In *Mundy v. Mundy*,¹⁰ one of the questions made was whether the widow was entitled in equity to the arrears, where the heir had always been willing to assign her dower. Lord Redesdale treats the right to arrears in equity as being the same as at law, observing that courts of equity, in assigning dower consider themselves to be proceeding merely on a right which may be asserted in a court of common law.¹¹ And upon the same principle, courts of equity, in deciding on the costs of suits for dower, have professed to be guided by analogy to the rules prevailing at law."

3. The following observations by Mr. Park, are upon the same subject:¹² "It seems that courts of equity, following the analogy to damages under the statute of Merton, will not entertain a bill for

¹ 2 Bro. C. C. 629.

³ 1 Roper, H. & W. 453, 454.

⁵ In 3 Atk. 130.

⁷ 2 Bro. C. C. 633.

⁹ 2 Bro. C. C. 632.

¹¹ Mitf. Pl. 122, 4th ed.

² 5 Burr. 2658.

⁴ 1 Roper, H. & W. 454, note.

⁶ 2 Bro. C. C. 628.

⁸ See post, §§ 20-22.

¹⁰ 2 Ves. Jr. 122; 4 Bro. C. C. 294.

¹² Park, Dow. 332.

mesne profits where the husband did not die seized; neither will they where the plaintiff is in possession, and consequently may have remedy at law.¹ But when the plaintiff is in a situation to be entitled to mesne profits, it appears that no limitation can be set up in equity to the recovery of arrears, for there being no limitation at law in assessing damages, the usual limitation of account to six years, by analogy to the statute of limitations, does not apply."² In regard to this last observation, it should be noticed that now by statute in England, no arrears of dower, nor any damages on account of arrears, are to be recovered or obtained by any action or suit, for any longer period than six years before the commencement of the action or suit.³

Cases in the American courts.

4. Nor do the authorities in the United States entirely harmonize upon this point. In New York, in the case of *Hazen v. Thurber*,⁴ the widow, although there had been no demand of dower of the heir or terre-tenant, was allowed mesne profits from the death of her husband. A similar decree was made in *Swaine v. Perine*,⁵ the chancellor referring in terms of approval to the case of *Oliver v. Richardson*.⁶ And in a case where the husband died seized, arrears of dower were allowed against a subsequent purchaser of the estate, although the widow had never applied to him for an allotment of her dower.⁷ But the purchaser was charged with arrears from the time only of his purchase. And as there was an outstanding mortgage upon the premises to which the dower right was subject, the arrears of dower were computed by deducting from one-third of the rents and profits, over and above the necessary repairs and taxes, one-third of the interest on the amount due on the mortgage at the time the defendant acquired his title. In *Johnson v. Thomas*,⁸ the chancellor, referring to the statute of Merton, said: "Even in cases coming within that statute, if she had not made a formal

¹ *Delver v. Hunter*, Bunb. 57.

² *Oliver v. Richardson*, 9 Ves. Jr. 222.

³ 1 Bright, H. & W. p. 424, pl. 14; 3 & 4 Will. IV., c. 27, § 41; *Bamford v. Bamford*, 5 Hare, 203; 2 Eq. R. 391.

⁴ *Hazen v. Thurber*, 4 John. Ch. 604.

⁵ *Swaine v. Perine*, 5 John. Ch. 482. But in this case the bill alleged that the defendant had refused to assign dower.

⁶ *Oliver v. Richardson*, 9 Ves. Jr. 222.

⁷ *Russell v. Austin*, 1 Paige, 192.

⁸ *Johnson v. Thomas*, 2 Paige, 377.

demand of dower before suit brought, the defendant at law might plead that he had been always ready to assign the dower, and thus excuse himself from damages and costs. But in chancery, the rule is different. There, if the husband died seized, the widow may recover against the heir or devisee her share of the rents and profits from the time the right accrued, although no demand was made previous to the commencement of the suit."

5. In Maryland, in the case of *Steiger v. Hillen*,¹ it was held, that mesne profits can be recovered against an alienee of the husband only from the time of demand and refusal to assign dower. In *Sellman v. Bowen*,² this doctrine was reaffirmed; and it was further determined, that a court of law possesses no jurisdiction in that State to award damages against an alienee, and that a court of equity is the only and peculiar forum for the recovery in such a case.³ The doctrine was also laid down that the alienee of a husband, who receives the rents and profits after the death of the latter, is considered in equity as a trustee or bailiff to the extent of the widow's claim for dower, and can not defeat her claim for mesne profits by pleading the statute of limitations.⁴ The rule where the heir is in possession, was thus stated by the chancellor, in Chase's case:⁵ "At law, the widow can recover damages or mesne profits for the detention of her dower only from the time it was actually demanded of the heir. . . . But in equity it is otherwise; here it is the course of the court to assign her dower, and universally to give her an account of the rents and profits from the death of her husband." In *Darnall v. Hill*,⁶ the court held, that "the heir in possession is answerable for damages from the death of the husband, even without demand, unless the heir plead *tout temps prist*; and even then he is liable from the date of the subpoena against him." Where the premises are subject to a lease, valid against the widow, one-third of the rent reserved thereon, and no more, can be recovered during the existence of the term. After that time the actual value must be the criterion.⁷

6. In Virginia, upon bill against the heir, the widow is entitled

¹ *Steiger v. Hillen*, 5 Gill & J. 121.

² *Sellman v. Bowen*, 8 Gill & J. 50.

³ To the same effect, *Kiddall v. Trimble*, 12 Gill & J. 388.

⁴ *Sellman v. Bowen*, *supra*; *Kiddall v. Trimble*, *supra*. See ante, ch. xx.

⁵ Chase's case, 1 Bland, Ch. 206. See *Wells v. Beall*, 2 Gill & J. 468.

⁶ *Darnall v. Hill*, 12 Gill & J. 388.

⁷ Chase's case, 1 Bland, Ch. 206. In regard to improvements, see ante, ch. xxii.

to mesne profits from the death of her husband; but in proceedings against an alienee of the husband, she is entitled to an account only from the date of the subpoena in the cause.¹ "The two jurisdictions being concurrent as to this matter," said Tucker, President, "I think the court of equity should follow the law."

7. In Kentucky, the courts of equity apply the rule adopted in the courts of law under the statute of Merton, and no damages are allowed where the husband did not die seized.² But an actual conveyance of the legal title is necessary to bring the case within this rule. Therefore, where there is a mere contract of sale, and the husband dies without executing a conveyance, a court of chancery will give damages equal to one-third of the value of the rents accrued from the commencement of the suit until decree rendered. And a sub-purchaser pending the proceeding will be required to account for the rents accruing after his purchase.³

8. In Alabama, upon a bill in equity against an alienee of the husband, the widow is entitled, by way of damages, to one-third of the rents of the premises from the time the bill was filed; and the amount of her proportion will be decreed to her as an ordinary money decree.⁴ As against the heir, she may recover mesne profits from the time of her husband's death.⁵ In New Jersey, the alienee of the husband is liable for mesne profits from the date of the demand; if there was no demand, from the time of filing of the bill.⁶

9. It has been determined on several occasions by the courts of South Carolina, that the statute of Merton is not in force in that State, and consequently that no damages are recoverable in the courts of law.⁷ But courts of equity, nevertheless, give to the

¹ *Tod v. Baylor*, 4 Leigh, 498.

² *Kendall v. Honey*, 5 Mon. 282; *Marshall v. Anderson*, 1 B. Mon. 198; *McElroy v. Wathen*, 3 B. Mon. 135; *Garton v. Bates*, 4 B. Mon. 366; *Golden v. Maupin*, 2 J. J. Marsh. 236.

³ *McElroy v. Wathen*, 3 B. Mon. 135. And now, by the revised statutes, rents may be recovered against a purchaser from the time of the commencement of the action. *Rev. Stat. Ky.* 394; *Yancy v. Smith*, 2 Met. (Ky.) 408.

⁴ *Johnson v. Elliott*, 12 Ala. 112; *Francis v. Garrard*, 18 Ala. 794; *Springle v. Shields*, 17 Ala. 295. See *Beavers v. Smith*, 11 Ala. 20.

⁵ *Slatter v. Meek*, 35 Ala. 528.

⁶ *Chiswell v. Morris*, 1 McCarter, Ch. 101.

⁷ See *Heyward v. Cuthbert*, 1 McCord, 386; *Wright v. Jennings*, 1 Bail. L. 277; *McCreary v. Cloud*, 2 Bail. L. 343; *Gordon v. Stevens*, 2 Hill, Ch. 429; *Keith v. Trapier*, 1 Bail. Eq. 63. By a singular anomaly in the legislation of South Carolina, there can be no recovery of damages in a court of law where the husband died

widow an account of the rents and profits from the time her right accrued until dower is assigned.¹ "In the case of *Heyward v. Cuthbert*,"² said Harper, Chancellor,³ "it was decided that a widow to whom dower has been assigned, was not entitled to damages for the detention of her dower. The grounds of that decision were, that by the English law, no damages were recoverable in dower, until the statute of Merton,⁴ and that statute is not in force in this State. That, however, was a decision in a court of law, and there is no doubt, that the court of chancery, ever since it has exercised jurisdiction in cases of dower, has uniformly given an account for the arrears of rents and profits. But as this jurisdiction has been exercised only since the passing of the statute of Merton, it is, perhaps, not perfectly clear, whether the account has been allowed in conformity to the statute, or on distinct equity principles. This statute being in existence there was no need to explain this matter in the decided cases; but on referring to the cases, I am sufficiently satisfied that the account for rents and profits has been allowed on distinct equity principles entirely independent of the statute. . . . The widow is entitled to the value of her dower in that [the value of the land at the time of the alienation] with the interest which has accrued since her husband's death."⁵

10. In North Carolina, as against the heir or his vendee, the widow is entitled to an account of the mesne profits from the death of her husband.⁶ And in a case where buildings which had been insured were destroyed by fire after the husband's death, she was

seized; but damages in the form of interest are given, even at law, where the husband aliened during coverture. "By the Act of 1824, amended by the Act of 1825, [Acts of 1824, p. 24, and of 1825, p. 20,] interest is allowed in cases where the land has been aliened during the life of the husband, but it is only in those cases." Opinion of the court in *Wright v. Jennings*, 1 Bailey, Law R. 277. See ante, ch. xxv.

¹ *Gordon v. Stevens*, 2 Hill (S. C.), Ch. 429; *Mey v. Mey*, 1 Bail. L. 277, note; *Keith v. Trapier*, 1 Bail. Eq. 63; *Woodward v. Woodward*, 2 Rich. Eq. 23. As against a purchaser she is entitled to an account from the time he went into possession. *Rickard v. Talbird*, Rice, Eq. R. 158.

² *Heyward v. Cuthbert*, 1 M'Cord, 386.

³ In *Keith v. Trapier*, 1 Bailey, Eq. 63.

⁴ 20 Hen. III., c. 1.

⁵ Affirmed in the court of appeals, where, however, a distinction was taken between "damages sustained *occasione detentione dotis*," and "mesne profits," the court declaring them two distinct things. *Keith v. Trapier*, 1 Bail. Eq. 63, 74. That the widow has been put to her election as to whether she would take under the law, or under the will of her husband, does not affect her right, in equity, to mesne profits from the time of her husband's death. *Woodward v. Woodward*, 2 Rich. Eq. 23.

⁶ *Campbell v. Murphy*, 2 Jones, Eq. 357; *Peyton v. Smith*, 2 Dev. & B. Eq. 325.

allowed a proportionate share of the insurance money.¹ In Mississippi, also, courts of equity will order an account of arrears upon the application of the widow.² In Ohio, the statute gives the widow rents from the date of filing her petition.³

11. Where a widow brings a suit at law for the recovery of her dower, she may, after a recovery there, proceed in equity for an account of the rents and profits.⁴ And in such case, where the suit is between the same parties, the judgment at law is conclusive of the marriage, and of the seizin of the demandant's husband.⁵ In a case in Mississippi, a bill was filed in chancery by husband and wife, setting forth that the wife was entitled to dower in the estate of her former husband; that a petition had been filed in the probate court of the proper county, for the allotment of the dower, and commissioners appointed for that purpose, who had set off the dower by metes and bounds, but that possession could not be delivered by the sheriff, because the premises were indivisible, and the defendants were in the occupancy of the buildings situate thereon, and refused to deliver possession. The bill further alleged, that the defendants had been in the possession and enjoyment of the premises, or in the receipt of the rents and profits since the death of the first husband, and refused to account for the portion due the widow. It was held, that a sufficient case was made by the bill to authorize a court of equity to render a decree in favor of the widow for the rents and profits of her share of the lot.⁶ In North Carolina, it is held, however, that after dower has been assigned at law, equity will not entertain a bill for mesne profits unless there be some equitable circumstances, such as loss of title deeds, or detention of such deeds, or a discovery is necessary.⁷

12. It is held in Maryland, that a bill for rents and profits is premature until the dower itself has been recovered.⁸ On the other hand, the equity courts of Mississippi will entertain a bill for mesne profits even if the widow neglect to have dower assigned.⁹

13. If the demandant proceed at law for the recovery of damages, in a case in which the courts of law have jurisdiction, and fail

¹ *Campbell v. Murphy*, *supra*.

² *Harper v. Archer*, 28 Missis. 212. See *Turner v. Morris*, 27 Missis. 733.

³ 1 Rev. Stat. Ohio, by Swan & Critchf. p. 522, § 18.

⁴ *Sellman v. Bowen*, 8 Gill & J. 50; *Bullock v. Griffin*, 1 Strobb. Eq. 60. See *Turner v. Morris*, 27 Missis. 733.

⁵ *Sellman v. Bowen*. 8 Gill & J. 50.

⁶ *Turner v. Morris*, 27 Missis. 733.

⁷ *Whitehead v. Clinch*, 1 Murph. 128; *Whitehead v. Bellamy*, 2 Hayw. 240.

⁸ *Kiddall v. Trimble*, 1 Md. Ch. Dec. 143. ⁹ *Harper v. Archer*, 28 Missis. 212.

to recover there, the question must be regarded as *res adjudicata*. She can not afterwards proceed for the same matter in a court of equity.¹ But where a bill was filed for an account of rents and profits; and pending that proceeding a second bill was filed in the same court by the complainant against the same defendant, claiming an assignment of dower in addition to an account of the rents and profits; and upon the latter bill dower was assigned and the assignment confirmed, but there was no order or judgment on the subject of anterior rents and profits, it was held that the proceedings and decree under the second bill constituted no bar to a recovery under the first.²

14. Upon a bill by husband and wife claiming a portion of rents and profits, as damages, for the detention of the dower of the wife, the heirs of the first husband can not set off a demand which they may have against the second husband for the use and occupation of the land during their minority. The two claims are not due in the same right, and that for damages would survive to the wife.³

Interest on arrears.

15. It is a general rule of courts of equity not to allow interest upon arrears of dower.⁴ Mr. Roper says⁵: "The rule is considered to be so absolute as to render it doubtful whether it will be relaxed in the most distressing cases;⁶ yet I have found no case to that effect, no authority pronouncing that a widow under no circumstances shall receive interest upon the money arising from her dower, improperly detained from her by the person who ought to have assigned it. If such were the rule in equity, the widow would be in a worse situation in that court than if she had brought her writ of dower at law; for we have seen that a jury in assessing damages *pro detentione dotis*, are at liberty to give her more than one-third of the by-gone annual value of the estate, if she have suffered injury to a larger amount in consequence of the non-assign-

¹ *Kiddall v. Trimble*, 1 Md. Ch. Dec. 143; *Sellman v. Bowen*, 8 Gill & J. 50.

² *Darnall v. Hill*, 12 Gill & J. 388.

³ *Darnall v. Hill*, 12 Gill & J. 388.

⁴ 1 Bright, H. & W. 428, pl. 22.

⁵ 1 Roper, H. & W. 457.

⁶ See *Ferrers v. Ferrers*, Forrest, 2; *Batten v. Earnley*, 2 P. Wms. 163; *Robinson v. Cumming*, 2 Atk. 411; *Newman v. Auling*, 3 Atk. 579; *Bedford v. Coke*, cited 2 Ves. Jr. 166; *Lindsay v. Gibbon*, cited 3 Bro. C. C. 495.

ment of her dower.¹ Now one species of damage the widow might suffer may arise from the payment of interest upon money borrowed for maintenance whilst contending for her right to dower; this payment of interest, it is presumed, would be an injury which a jury would feel no difficulty in considering in their estimate of damages for the detention of dower; and it would seem singular if a court of equity, professing to favor the widow's claims, and upon that principle to extend to her relief even beyond what she could obtain at law,² should refuse to give her the same relief which she might have had in a court of common law. But it may be said, that a court of equity declines to give interest in this instance, in analogy to its practice in refusing interest upon arrears of annuities, and of such even as are granted by way of jointure, in bar of dower. The analogy, however, does not seem to be applicable in this instance, because these annuities are created by express contract among the parties in solemn instruments, and they might if they thought proper, have provided for the payment of interest upon the arrears of the annuities granted, to which transactions the observation of Lord Thurlow in *Tew v. The Earl of Winterton*³ applies, viz., 'that the court has never given interest but where there has been some ground from whence it could gather that there was a contract between the parties that interest should be paid.' This remark can only apply to instances where there is a possibility of such a contract being made; or to cases where annuities are given by deed or will, in which provision might be made for the payment of interest upon arrears,⁴ and not to a case like the present, where the widow's title is created by law; moreover, it could not mean, that in such a case the deforceor of the widow's dower should be in a better condition in equity than at law, as he would be, as it has been before shown, if the interest paid by the widow for money borrowed to support her till she obtained her dower, should not be repaid her in equity in the shape of interest upon the arrears due in respect of such dower. The cases in which interest has been refused were chiefly of annuities, for the payment of interest upon the arrears of which provision might have been made. And even in these instances Lord Hardwicke expressed an opinion, in an anonymous case reported by the elder Vesey,⁵ that

¹ See ante, ch. xxv.

² 2 Bro. C. C. 629.

³ 3 Bro. C. C. 495; 1 Ves. Jr. 451.

⁴ *Mellish v. Mellish*, 14 Ves. Jr. 516.

⁵ 2 Ves. Sen. 662. See 2 Ves. Jr. 167.

‘interest upon arrears might be given in a special case, as the being obliged to borrow money, and to pay interest for it, and then, said his lordship, the court will give interest from a reasonable time.’ Upon the whole, it is submitted as a reasonable presumption, and as being in analogy to law, and not inconsistent with the decisions in equity, that interest will not be given upon arrears of dower except under special circumstances, one of which is where the widow has been under the necessity of taking up money at interest for her maintenance whilst her dower was withholden.”

16. Mr. Jacob discusses the same subject in the following terms:¹ “In the old cases, much diversity of practice prevailed upon the question whether interest on arrears should be allowed. ‘The result (as Lord Redesdale observes),² has been to refuse interest, except under very particular circumstances, and though it seemed to be the justice of these cases to give interest, it has been found the wisest way not to do so, as the principle might be extended so far as to become highly mischievous, and tend to create litigation in every case, and to encourage creditors to delay the prosecution of their suits.’ The cases have not furnished any precise rule for ascertaining what special circumstances will be sufficient to warrant a departure from the general rule. Long delay occasioned by the misconduct of the defendant, would, perhaps, form a ground of distinction.³ But it seems probable that in cases of this sort, the courts would not at this day make an exception, founded solely on the pecuniary circumstances of the party to whom the arrears are due. In *Tew v. Winterton*, Lord Thurlow observes: ‘Poverty, compassion, &c., have been the reasons which have influenced the court, according to the printed cases, which are so indistinct that I can not decide upon those principles. I should be very sorry to give as my reason for doing it, that she was in distress, or had borrowed money, &c.’”⁴

17. But in South Carolina, if the husband die seized, and a sum of money is assessed in lieu of dower, the widow is entitled, in equity, in addition to the sum assessed, to one-third of the mesne profits from the death of her husband to the time when the return of the commissioners is confirmed; and also to interest on the sum

¹ 1 Roper, H. & W. 459, note.

² In *Anderson v. Dwyer*, 1 Sch. & Lef. 303.

³ See *Burton v. Todd*, 1 Swan. 255.

⁴ See, also, *Park, Dow.* 332; 2 *Crabb, R. P.* 190; 2 *Dan. Ch. Pr.* 1344; *Wakefield v. Childs*, 1 *Fonbl.* 22.

assessed from the time the return is confirmed until the money is paid.¹

18. We have seen that where the premises are subject to an outstanding lease for years in which the wife has joined, she is entitled to one-third of the rents reserved during the existence of the term.² She is also entitled to interest upon her proportion of the rent from the time it becomes due, or is actually paid by the tenant to the owner of the inheritance.³

The widow not entitled to an allowance pendente lite.

19. An order for maintenance *pendente lite* will not be made in behalf of a widow on her bill for dower.⁴ But in consideration of the fact that she requires the profits of her dower for her immediate support, if her claim form an ingredient only, in the suit, and several matters are referred to a master to inquire into and make a general report, the court will not delay the payment of arrears of the widow's dower until the general report is made, but will direct the master to make an immediate separate report of what is due to her for arrears, in order that she may receive them for her maintenance. This was accordingly done in *Eccleston v. Berkley*,⁵ where an account was directed to the master in regard to several incumbrances made by the husband after the marriage upon the dowable estate. Lord Hardwicke, upon the application of the widow, directed the master to make a separate report of what was due to her in respect of dower, she being entitled to one-third of the rents, paramount to the claims of the incumbrancers.⁶

Death of the defendant pending the suit.

20. At law, mesne profits, under the term "damages" in the statute of Merton, are lost by the death of either the plaintiff or the defendant, before they are assessed and ascertained.⁷ But the rule is otherwise in equity. That court has been more liberal to the widow, from the consideration that the profits of a third part of her husband's real estate are her principal, and sometimes her only means of subsistence from the time of his death. It is, there-

¹ *Woodward v. Woodward*, 2 Rich. Eq. 23.

² *Ante*, § 5.

³ *Chase's case*, 1 Bland, Ch. 206, 232. See, also, *Baird v. Bland*, 5 Munf. 492; *Davis v. Walsh*, 2 H. & J. 344.

⁴ *Rockwell v. Morgan*, 2 Beasl. Ch. 119.

⁵ *Eccleston v. Berkley*, Ridg. Ca. temp. Hardw. 253.

⁶ 1 Roper, H. & W. 456; 2 Crabb, R. P. 190.

⁷ See *ante*, ch. xxv., §§ 54-56.

fore, the course of the court to assign to her dower, and to give to her an account of the mesne profits, provided, that at the time of the bill filed the right to damages was not gone, and not to permit her title to them to be defeated by the death of the tenant *pendente lite*; upon the principle that it would be unjust if the defendant's denial of her right of dower, and the accident of his death before the establishment of it, should be allowed to place her in a worse situation than if he had thrown no impediment in her way, and had fairly and candidly admitted her claim.¹

Death of the widow before dower has been assigned.

21. In the English equity courts the rule is well established, that the omission to obtain an actual assignment of dower will not affect the right of the widow, while living, to obtain payment of mesne profits in equity, nor deprive her personal representative of them in the event of her death.² The want of a formal assignment of dower, said Lord Cowper, in *Hamilton v. Mohun*,³ is nothing in equity, since the widow's right in conscience is the same as if it had been made. His lordship, therefore, in that case, decreed to the widow in a suit instituted against her by the heir for an account of the profits of the dowable estate of which she had been in possession as his guardian, an allowance of one-third of them in respect of her right to dower. That case was followed by Lord Hardwicke, in *Graham v. Graham*,⁴ a case in which the widow was the plaintiff, who being a trustee of the dowable estate for her son, and having received the profits, and being therefore accountable to

¹ *Curtis v. Curtis*, 2 Bro. C. C. 620; *Dormer v. Fortescue*, 3 Atk. 130; 1 Roper, H. & W. 452; *Park, Dow.* 330; 2 Crabb, R. P. 189; 2 Dan. Ch. Pr. 1344; *Adams's Eq.* *234; 1 Story's Eq. Juris., § 625. See Lord Redes. 122. Mr. Park insists with much force of reasoning, that it is not necessary the bill should be filed in the lifetime of the heir to entitle the widow to a decree for mesne profits. See his comments upon the observations of Lord Alvanley in *Curtis v. Curtis*, *Park, Dow.* 330. In North Carolina, if the defendant to an action at law for dower die pending the suit, the widow can not afterwards proceed in equity against his representatives for mesne profits. *Whitehead v. Clinch*, 1 Murph. 128. By the Missouri statute, where one or more of the defendants die, the action shall proceed against the survivors; if all the defendants die, the action may be renewed against the executors or administrators, as in other cases. 1 Rev. Stat. Misso. 1855, p. 679, § 51.

² *Wakefield v. Childs*, 1 Fonbl. Eq. 22, note; *Lindsay v. Gibbon*, cited 3 Bro. C. C. 495; 1 Story's Eq. Juris., § 625.

³ *Hamilton v. Mohun*, 1 Peere Wms. 118, 122.

⁴ *Graham v. Graham*, 1 Ves. Sen. 262.

him for them, claimed an allowance for her dower in rendering the accounts; and his lordship not only allowed to her the amount of the arrears, but also secured to her the future payment of her dower.¹

22. In the American courts, there is some diversity in the decisions in regard to the right of the administrator of the widow to recover mesne profits where she has died before dower has been assigned. In Maryland, if her death occur pending proceedings for the establishment of her right, her personal representative may recover; otherwise not;² while in Mississippi, mesne profits may be recovered in equity, even though the widow has entirely neglected to bring suit for her dower.³ In Pennsylvania, in the case of *Sandback v. Quigley*,⁴ the court, while enforcing the general rule that the death of the widow abates an action at law, nevertheless suggest that a special action on the case may be maintained by her administrator against the heir or feoffee. After adverting to the English equity rule, they say: "It has been urged that, as we have no court of chancery, equitable relief may be given in the action of dower, notwithstanding no judgment is, or can be rendered. But it would be a novelty,—an act of legislation, rather than judicial power; it would be too great an innovation on established forms, by an act of the court, to allow the substitution of executors as parties in an action of dower to enable them to recover damages for the detention of the dower. But as the law should not be subject to the reproach of giving a right without a remedy, I would suggest that, until the legislature think proper to interfere, relief might be given in a special action on the case, by the personal representatives against the heir or feoffee, or against each, or both, for the time they respectively occupied the premises." In the case of *Conklin v. Bush*,⁵ it was decided that account render does not lie by an administrator of a widow for the profits of land conveyed by her husband, against the grantee; and that no suit can be maintained where the widow dies before recovering judgment in an action of dower. But in the recent case of *Paul v. Paul*,⁶ it was held, that in equity the personal representative of a widow entitled to dower in lands of which her husband died seized, may have an

¹ 1 Roper, H. & W. 455; Park, Dow. 330; 2 Crabb, R. P. 189. See *Tompkins v. Fonda*, 4 Paige, 448; *Evertson v. Tappen*, 5 John. Ch. 497; *Mathes v. Bennett*, 1 Foster (N. H.), 204.

² *Kiddall v. Trimble*, 1 Md. Ch. Dec. 143; *Steiger v. Hillen*, 5 Gill & J. 121.

³ *Harper v. Archer*, 28 Missis. 212.

⁴ *Sandback v. Quigley*, 8 Watts, 460.

⁵ *Conklin v. Bush*, 8 Barr, 514.

⁶ *Paul v. Paul*, 36 Pa. St. (12 Casey), 270.

account of the rents and profits, although dower had not been assigned in her lifetime, and no proceedings had been instituted for that purpose. In Ohio, it has been determined, that the right to mesne profits is entirely lost by the death of the widow while her bill for dower is pending.¹ But a statute has since been adopted in that State, which allows a revivor of the proceeding, where the widow dies during its pendency, and a recovery of mesne profits from the date of filing the petition to the time of her death.² So, by statute in Missouri, if the widow die before action brought, her executor or administrator may maintain an action for damages.³ In Illinois, if the widow die before her right has been established, although after suit brought, her representative is not entitled to mesne profits as against an alienee of the husband.⁴ Whether, in such case, arrears may be recovered, in equity, against the heir, or a person claiming under him, has not been determined.⁵ In New York, prior to the revised statutes, if the husband died seized, the death of the dowress pending a suit in equity for her dower, did not deprive her personal representative of the arrears due at the time of her death; and he was permitted to revive the suit for the purpose of obtaining such arrears. But where the husband did not die seized, if the demandant died before her right to dower was established, the personal representative was not entitled to arrears, and therefore could not revive.⁶ The right, in equity, of the personal representative of a widow to one-third of the rents of land in which she was entitled to dower, has been recognized in North Carolina.⁷ In a case in Kentucky, the complainant in a bill in chancery for dower, died before her right was determined. Her heirs subsequently instituted proceedings for an account of the rents and profits down to the period of her death, alleging that administration had not been taken out on her estate. The court avoided expressing any opinion on the question as to the liability of the tenant for mesne profits, but held, that conceding the liability to exist, an action therefor could not be maintained by the heirs, but must be brought by an administrator.⁸

¹ *Miller v. Woodman*, 14 Ohio, 518. In this case the husband died seized; a decree for dower had been rendered, and the return of the commissioners, assigning dower, and assessing the annual value of the rents, filed. The widow died pending exceptions to the report, and before a decree of confirmation.

² Act of Feb. 12, 1863, 60 Ohio Laws, p. 10.

³ 1 Rev. Stat. Misso. 1855, p. 679, § 51.

⁵ *Ibid.*

⁷ *Peyton v. Smith*, 2 Dev. & B. Eq. 325.

⁴ *Turney v. Smith*, 14 Ill. 242.

⁶ *Johnson v. Thomas*, 2 Paige, 377.

⁸ *Coons v. Nall*, 4 Litt. 264.

CHAPTER XXVII.

EFFECT OF AN ASSIGNMENT IN DISCHARGING OTHER LANDS FROM THE CLAIM OF DOWER.

1. THE consequence of a valid assignment of dower is, that the title of dower, which, on the death of the husband attached upon all the lands of which he was seized during the coverture, is discharged as to all the remaining lands, (except so far as there may be a lien upon them by reason of the warranty,)¹ if the assignment was made in allowance of all the lands; or as to the remaining parts of the particular lands which the assignment, if partial only, was made in allowance of. The heir or grantee may therefore make a good title to the remaining lands, or parts of lands, without the concurrence of the dowress; for if she were to bring a writ of dower against the owner of these lands, the assignment might be pleaded in bar to the action.²

2. But if there be several grantees of land of which a woman is dowable, and one of them, by agreement with her, assign a portion of his land to her in allowance of *all* the freehold which belonged to her husband, it has been doubted whether this assignment shall discharge the other grantees from the claims of the dowress. It is supposed by Perkins that it shall; "but some," he adds,³ "have said the contrary,"⁴ for they say that they can not plead this matter against the woman in several writs of dower brought by her against them; *tamen quære*. And the feoffee who made the assignment can not come into court and plead this matter in actions brought against the other feoffees, because he is a stranger to those actions, and there is not any means to bring him into court." But "if a man seized of two acres of land in fee take a wife and enfeoff

¹ See post, ch. xxix.

² Park, Dow. 213, 277.

³ Perk. § 402.

⁴ In Co. Litt. 35 a., it is laid down as clear, that the other feoffees can take no benefit of the assignment; and Sir M. Hale, in his note upon that passage, states it to have been so adjudged in Throgmorton's case, M. 8 Jac. C. B. Greening's note, Perk. § 402.

a stranger of one of the acres with warranty, and die, and both acres are in one county, and the heir endows his mother of parcel of his acre in allowance of all her dower in both acres, it is a good assignment; for if the feoffee had been impleaded by the woman in a writ of dower, he might have vouched the heir, and the demandant should have recovered against the heir conditionally.¹ And if the heir lease for life to a stranger, parcel of the land which he hath by descent from his father, and assign to his mother parcel of the land which remains in his possession in allowance of all her dower, as well for the land leased as for the land which remains in his possession, the assignment is good; and yet, if the woman implead the lessee by a writ of dower, and he vouches his lessor, the wife shall not have judgment to recover against the heir, because he is not bound to the warranty by the lien of his father, who was husband to the woman. *Quære*, if in such a case, the lessee vouch the heir generally, and the heir enter generally into the warranty, then it seems judgment shall be given for the demandant against the vouchee conditionally."²

3. By statute in New York,³ Michigan,⁴ Wisconsin,⁵ Minnesota,⁶ and Oregon,⁷ when a widow has accepted an assignment of dower in satisfaction of her claim upon all the lands of her husband, it may be pleaded in bar of any further claim of dower, by the heir, or by a grantee of the husband or of the heir. And it has been held in New Hampshire, to be no answer to a plea that dower has been assigned, that it was not assigned within thirty days after demand, if it appear that it was accepted.⁸ In New Jersey,⁹ Mis-

¹ Perk. § 400; Moor, 25, 26; Co. Litt. 35 a.

² Perk. § 401. This appears to turn altogether upon the form of the voucher; no precedent upon the point has been found. It seems that by vouching "his lessor," is meant that the tenant in his plea names him as the party who made the demise; and that by vouching the *heir* generally, is meant vouching him as "A. son and heir," &c., without showing how he is bound to warranty. In the latter case he might be bound either by his own deed or the deed of his ancestor, (Vin. Abr. Voucher, E. b., pl. 8, 9,) and when he had entered into the warranty upon this voucher, his being named as heir, might probably be considered as showing that he was bound by his ancestor; and therefore lead to the usual form of judgment, as suggested in the *quære*. Note by Greening, Perk. § 401.

³ 1 Rev. Stat. N. Y., p. 743, § 23.

⁴ 2 Comp. Laws Mich. p. 854, § 28.

⁵ Rev. Stat. Wis. 1858, p. 549, § 28.

⁶ Stat. Min. 1858, p. 410, § 28.

⁷ Stat. Oregon, 1855, p. 408, § 28.

⁸ Clark v. Muzzey, 43 N. H. 59.

⁹ Nixon's Dig. p. 209, § 4.

souri,¹ Kansas,² and Delaware,³ it is provided, that a writ of dower shall not abate by the exception of the tenant that the demandant hath received her dower of another person, before her writ was sued out, unless he can show that the dower so received, was in satisfaction of her right of dower in the lands or tenements whereof she demands dower.

4. It should be noticed as a point of possible occurrence, that where the wife recovers dower by writ against a vouchee *conditionally*,⁴ the lands of the tenant are not absolutely discharged from the title of dower, but may eventually be liable, and that the lien of the judgment will follow the lands in the hands of an alienee. As in the following case: "If a man seized of two acres of land in fee in one county, take a wife, and enfeof a stranger of one of the acres with warranty, and have issue and die; and his issue enters into the other acre, and the wife brings a writ of dower against the feoffee, and he vouches the issue, &c., who loses by default, and the wife has judgment conditional, viz., to recover against the vouchee, if he, &c., and the demandant sues execution accordingly, and she is put in execution of land which the vouchee hath by descent as heir to her husband in the same county in which the writ of dower is brought, of which land she is dowable, and the tenant holds in peace, and the vouchee is restored to the land which the wife recovered by a writ of deceit; in this case the wife shall have a *scire facias* against the feoffee who was tenant in the writ of dower, to be endowed anew of the land of which she demanded dower in the writ of dower; and notwithstanding that the tenant hath enfeofed a stranger of the same land before the *scire facias* brought against him, yet his feoffee shall be bound by the judgment given in the writ of dower; because the judgment in the writ of dower was given of this land conditionally."⁵

5. We shall see in a subsequent chapter,⁶ that in consequence of the implied warranty, if the particular lands which are assigned to the widow in dower, are recovered against her by lawful title, her title of dower in the remaining lands revives, and she is entitled to

¹ 1 Rev. Stat. Misso. 1855, p. 676, § 37.

² Comp. Laws Kansas, 1862, p. 482, § 26.

³ Del. Code, 1852, p. 292, § 13. The Virginia statute of 1785, was to the same effect. 12 Hen. Stat. p. 163, § 2; 1 Rev. Code, 1819, c. 107, § 5.

⁴ See ante, ch. v. § 54.

⁵ Perk. § 421.

⁶ Post, ch. xxix.

be newly endowed of one-third of those lands, although sold by the heir during the interval.¹ It would therefore seem that where a person selling lands relies upon an assignment of dower of other lands as discharging the lands sold from a title of dower, and the lands assigned are held under a different title from those sold, the purchaser ought to be satisfied of the goodness of the title to the lands assigned as well as to those sold.²

¹ Perk. §§ 418-420.

[² Park, Dow. 280.]

CHAPTER XXVIII.

ADMEASUREMENT OF DOWER WHERE THERE HAS BEEN AN EXCESSIVE ASSIGNMENT.

§ 1-6. Excessive assignment by the heir.

7-15. Excessive assignment by the sheriff or commissioners.

16, 17. Compensation to the widow for improvements where dower is admeasured on account of an excessive assignment.

Excessive assignment by the heir.

1. It may happen that the heir, in making the assignment, has set off to the widow more than a third part of the subject in which she was entitled to dower. If he were of full age, and under no disability at the time, a court of law will extend to him no relief.¹ In a case² sent by the court of chancery to the court of common pleas, it appeared that the heir being of full age, let his ancestor's widow into possession of, and assigned to her for dower of an estate called A., certain closes of land, in which there was an open coal mine wrought at times during the marriage, but which had been discontinued long before the husband's death. The value of the closes was amply sufficient to answer any demand of dower, without regard to the value of any of the coal. The question was, whether the heir had any, and what relief in respect to the excess of his own assignment? And the court certified, that since the assignment was the act of the heir himself, he being of full age at the time, they thought that he had no remedy at law against the dowress for avoiding the consequences of that act.³

2. But if the heir were under age when he assigned dower, the common law protects him against the consequences of an excessive assignment, and supplies him with the writ of admeasurement of dower.⁴ Of this writ, a remedy, as Mr. Park observes,⁵ now nearly

¹ Gilb. Dow. 380.

² Stoughton v. Leigh, 1 Taunt. 404, 412.

³ 1 Roper, H. & W. 407.

⁴ Ibid. 408; Young v. Tarbell, 37 Maine, 509; McCormick v. Taylor, 2 Carter (Ind.), 336. See post, § 9.

⁵ Park, Dow. 273.

obsolete, the following account is given by Chief Baron Gilbert :¹ "The writ of admeasurement of dower lieth where the heir, when he is within age, endoweth the wife of more than she ought to have dower of; or if the guardian² endoweth the wife of more than one-third part of the land of which she ought to have dower, then the heir at full age may sue this writ against the wife, and thereby she shall be admeasured, and the surplusage she had in dower shall be restored to the heir; but in such case there shall not be assigned anew any lands to hold in dower, but to take from her so much of the lands as surpasseth the third part whereof she ought to be endowed; and he need not set forth of whose assignment she holds. 17 Ed. III., 66. A view is not grantable on this writ. 17 Ed. III., 67, cont. adjudged 18 Ed. III., 3, 20; and it seems that the heir within age shall have an admeasurement of dower of his own assignment. 7 Ed. III., Admeasurement, B.;³ but if the heir at full age assigns dower, he shall not have this writ against his own assignment. 6 H. III., Admeasurement, 18. And if the heir within age, before the guardian enters into the land, do assign to the wife more land in dower than she ought to have, then the guardian shall have the writ of admeasurement against the wife, by the stat. of West. 2, c. 7, and if the guardian brings the writ, and does pursue it against the wife, yet the heir at his full age, by the same statute, shall have the writ of admeasurement of dower against the wife."⁴

3. In the English practice, this writ is viscontiel, and addressed to the sheriff, directing him to make the admeasurement finally. It is not made returnable, and the parties may plead before him if they think proper. The plaintiff, however, may, without showing any cause, and the defendant may, upon showing cause, remove the writ into the court of common pleas, as in a replevin; and then process will issue out of that court, viz.: a summons, attachment, distringas, &c. In such cases, the sheriff can not make admeasurement, but he ought to extend all the lands particularly, and make a return to the court of common pleas, upon which the judges will make the admeasurement.⁵

¹ Gilb. Uses, 379. See, also, Fitzh. N. B. 148.

² This means guardian in chivalry. By the old law the guardian in socage could not assign dower. Ante, ch. iv., §§ 6, 12; Park, Dow. 274, note.

³ *Quære*, 7 Ed. II., Admeasurement, 13.

⁴ Park, Dow. 273-4.

⁵ Fitzh. N. B. 148, G. H.; 1 Roper, H. & W 408. See, also, Gilb. Dow. 385.

4. Where the lands lie in different counties, there must be several writs for each county, and inquests held in each, and the writs are made returnable before the judges, who, after comparing the various returns, adjudge the quantity of land to be returned to the heir.¹

5. The books differ in regard to the time when the heir is entitled to issue the writ; some of them stating that he can not have it before he attains the age of twenty-one years;² while others mention that he is entitled to it during his minority;³ "but reason and principle," says Mr. Roper,⁴ "seem to be in favor of the law as laid down by Fitzherbert in his book last referred to in the notes, that the heir is entitled to the writ during his non-age."

6. But an infant heir who has assigned too large a portion of lands for dower, can not defeat the assignment by entry upon attaining twenty-one, because the widow being entitled to dower, the assignment is good in part, and can only be defeated *quoad* the excess, which is uncertain previous to the admeasurement.⁵

Excessive assignment by the sheriff or commissioners.

7. If the sheriff assign dower contrary to common right,⁶ when it might have been assigned regularly, it seems that this is error in the execution, and may be taken advantage of by the tenant as such.⁷ And if the assignment be of lands not comprised in the judgment, they may be recovered back in an ejectment; for whatever is included in the sheriff's return, and not authorized by the judgment, to that extent the execution is void.⁸

8. It is said by Duddridge, J., in the case of *Howard v. Mansfield*,⁹ that if the sheriff commit error by assigning a larger part than he ought, a writ of admeasurement lies, but not error, inasmuch as the judgment and award of execution are good. It is, however, very doubtful whether the writ of admeasurement can be resorted to in this instance; and Mr. Park expresses the opinion

¹ 1 Roper, H. & W., by Jacob, 408, note. See Gilb. Dow. 382.

² Co. Litt. 39 a.; 2 Inst. 367. See, also, quotation from Gilbert, ante, § 2.

³ Fitzh. N. B. 149 B.

⁴ 1 Roper, H. & W. 408.

⁵ Gilb. Dow. 388; 1 Roper, H. & W. 408; *McCormick v. Taylor*, 2 Carter (Ind.), 336.

⁶ Ante, ch. iv., §§ 22-35.

⁷ Styles, 276, in *Booth v. Lambert*; Park, Dow. 271. As to error in the return, see *Howard v. Mansfield*, Palm. 264.

⁸ 2 Ld. Raym. 1293-1295; 1 Roper, H. & W. 406.

⁹ *Howard v. Mansfield*, Palm. 266.

that no precedent for it is to be found.¹ But according to the practice at common law, if the sheriff assign more than a third part of the lands for dower, the heir or tenant may bring a *scire facias* for an assignment *de novo*.²

9. We have seen³ that if an infant heir assign to the widow more than her just proportion of the lands, he may have relief upon the writ of admeasurement of dower. But Mr. Roper states,⁴ that if the assignment had been made under the judgment of a court of law, a writ of admeasurement would not lie for the heir at his age of twenty-one, since it is presumed, from his being an infant when the assignment was made, the court took care of his interest. It seems, however, that the heir may bring a *scire facias*, as in other cases, or he would be without remedy.⁵

10. It seems, also, that a court of equity will entertain a bill for relief against a partial assignment of dower by the sheriff, and that that court may direct a new writ of seizin to the sheriff, and even order him to divide the lands into three parts, and to choose by lot.⁶ In the particular case from which this doctrine is gleaned, the assignment was charged to have been fraudulently made; and besides the excess of value, it appeared that the father of the dowress was the only person that, on behalf of the infant children, defended the writ of dower, and appeared to see the same set out, which was relied on as looking like collusion. The case of *Sneyd v. Sneyd*,⁷ affords another instance of an assignment by the sheriff being set aside in a court of equity on a bill charging partiality and excess.⁸

11. Mr. Jacob has the following observations upon this mode of obtaining relief:⁹ "As dower is now rarely sued for at law, cases of this kind are not likely to occur, but it is doubtful whether courts of equity would at present entertain this jurisdiction, if it appeared that the party aggrieved might have adequate redress in the court of law under whose authority the sheriff acted. In *Stratford v. Twynam*,¹⁰ the master of the rolls was of opinion that

¹ Park, Dow. 271.

² Gilb. Dow. 389; Palm. 266; Bro. Dow. fo. 255 b., pl. 83; Bro. Extent, pl. 13; Fitzh. N. B. 148, note (b); 1 Roper, H. & W. 406, 409; Park, Dow. 271.

³ Ante, § 2.

⁴ 1 Roper, H. & W. 409. See the comments of Mr. Jacob, Ibid. note.

⁵ Gilb. Dow. 389; 1 Roper, H. & W. 409.

⁶ *Hoby v. Hoboy*, 1 Vern. 218; 2 Ch. Ca. 160.

⁸ Park, Dow. 272; 1 Roper, H. & W. 406.

¹⁰ Feb. 16, 1822.

⁷ *Sneyd v. Sneyd*, 1 Atk. 442.

⁹ 1 Roper, H. & W. 406, note.

there was no jurisdiction in equity to set aside a sale by a sheriff under an execution, but that the proper course was to apply to the court of law from which the process issued."

12. The practice in the United States, it is believed, conforms to the mode of procedure indicated by Mr. Jacob in the above quotation. The remedy for a partial or excessive allotment of dower may be furnished by the court in which the proceedings are had; and the proper time to raise an objection to the manner or extent of the assignment, is when the return is made to the court.¹ In a case in South Carolina, in which it appeared from the return of the commissioners that they had set off to the widow more than one-third of the land, the court treated their action as irregular and set aside the proceedings.² The following is stated as the rule in North Carolina:³ "The Act of 1784 has not indicated the remedy for an illegal or excessive allotment of dower; but the usages of

¹ *Chapman v. Schroeder*, 10 Geo. 321; *Stiner v. Cawthorne*, 4 Dev. & B. Law, 501; *Eagles v. Eagles*, 2 Hay. 181; *Hawkins v. Hall*, 2 Bay, 449; *Williams v. Lanneau*, 4 Strob. 27; *Douglass v. McDill*, 1 Spears, 139; *Gibson v. Marshall*, 5 Rich. Eq. 254; *Payne v. Payne*, Dudley, Eq. 124; *Heyward v. Cuthbert*, 2 Con. Court (Treadw.), 626; s. c. 3 Brev. 482; *McCormick v. Taylor*, 5 Ind. 436; *Beaty v. Hearst*, 1 McMullan, 31; *Loyd v. Malone*, 23 Ill. 43; *Shirtz v. Shirtz*, 5 Watts, 255, 259; *Benner v. Evans*, 3 Penn. 456, 457. The evidence of commissioners to assign dower may be heard in impeachment of their assignment. *McCormick v. Taylor*, 5 Ind. 436. They must be sworn, and the statement of that fact, and the oath they took, should accompany their report. *Loyd v. Malone*, 23 Ill. 43. Where the return is perfect, and exactly in conformity to legal rules, and is verified by the oath of all the commissioners, it is entitled to full credit, rather than the *ex parte* affidavit of two of them. *Beaty v. Hearst*, 1 McMullan, 31. In Ohio, it has been held, not to be error on the part of the commissioners to refuse to permit the parties to examine witnesses before them as to the condition of the property at the time the husband parted with the title. *Rumsey v. Glaze*, (not reported,) Sup. Court of Ohio, Dec. term, 1862. An instruction to commissioners appointed to assign dower, to set off the same by metes and bounds, will be presumed to be right where the record does not contain the evidence. *Throp v. Johnson*, 3 Ind. 343. After judgment obtained and execution issued for the amount assessed in lieu of dower, if it appear, on motion, that the respondent had been served with a copy of a different summons from that on which the subsequent proceedings were based, the court will order the execution, the judgment, and all the other proceedings to be set aside. *Williams v. Lanneau*, 4 Strob. 27. In proceedings in partition, the objection that two of the heirs, who are infants, have no part of the inheritance given to them until after the death of their mother, the parts allotted to them being incumbered with her dower for life, is fatal to the return of the commissioners. *Wilhelm v. Wilhelm*, 4 Md. Ch. Dec. 330. The legality of the proceedings can not be contested by one having no interest to be affected thereby. *Rawson v. Clark*, 38 Me. 223.

² *Hawkins v. Hall*, 2 Bay, 449.

³ *Stiner v. Cawthorne*, 4 Dev. & Bat. L. 501; *Eagles v. Eagles*, 2 Hay. 181.

our courts have defined it, to wit, that when the report of the jury is returned, exceptions may be thereunto taken by any one thereby aggrieved, and the court will set aside the allotment, and order a new allotment, if sufficient cause be shown. And if a judgment be pronounced, overruling such exceptions, the party may appeal, which will not disturb the judgment that the widow recover her dower, nor vacate anything that has been done in execution of that judgment; but will only carry up the proceedings instituted to set aside the inquisition of the jury." In Georgia, the Act of 1824¹ provides, that when the return is made, the persons interested may show probable matter in bar of the confirmation of the assignment, or that the applicant is not entitled to so much as has been assigned, in which case the court shall permit an issue to be made up and tried by a special jury.²

13. But circumstances may occur long after the original proceedings have terminated, which render it just and proper that an assignment *de novo* should be ordered in behalf of the tenant, and in such cases a court of equity will afford relief. An example of this is furnished by the case of *Singleton v. Singleton*.³ There, some years after dower had been set out to the widow, a recovery was had against the heirs by the holder of a paramount title, which deprived them of a large portion of the tract of which the widow had been endowed. This loss fell entirely on the part reserved to the heirs; and there was, moreover, a decree against the estate for several thousand dollars, for deterioration of soil and the rents and profits. Upon this state of facts, the court regarded it as a clear principle of equity, that the widow was not entitled to retain as her dower one-third of the entire tract, after a fourth or a third of it had been lost. "It would be just as reasonable," they said, "to suppose that she would be entitled to retain one-third of the whole after the remaining two-thirds had been lost by an adverse claim. The heirs, as between them and the widow, are as much entitled to two-thirds of the land of which the ancestor died seized, as the widow is to one-third." And they added: "As the heirs were made liable for rents upon the lost land during the whole time it was held by or for them,—that is, from the close of the year 1815, when the widow's dower was assigned, the case is, in effect, as if they had not had the use of the lost land at all; and as to them, it

¹ Act of 1824, § 4; Prince, 459.

² *Chapman v. Schroeder*, 10 Geo. 321, 328.

³ *Singleton v. Singleton*, 5 Dana, 87.

may be considered as lost before the assignment of dower; while the widow has enjoyed the issues and profits of one-third of the whole tract during the entire period. To remedy this inequality, there should have been a re-assignment or re-admeasurement of dower, giving to the dowress one-third of the tract exclusive of the lost land. And the dowress and her successive husbands, who have enjoyed the dower land in her right, should be held accountable to the heirs, as trustees, for the reasonable annual value during the respective periods of their enjoyment of the excess of the dower as originally assigned, beyond the proper quantity ascertained upon the re-admeasurement." It was further held, that the account for rents upon the excess should not be charged with interest, but should be credited with the value at the time of the assessment of such improvements as had been made by or for the widow during the periods to which the accounts respectively applied.

14. It has been suggested, also, that equitable relief may be had in a proper case, where the assignment was of the rents and profits. "It seems," remarked the court in *Gove v. Cather*,¹ "that after a decree allowing the widow a yearly sum in lieu of dower, the allowance may be changed upon filing a bill, if the income of the property be materially enhanced or lessened."

15. In Missouri, any person not made a party to a proceeding for dower and duly notified of its pendency, and who has not appeared in the action, (except such as claim under parties who were notified or appeared, by title derived after the suit,) may have an action against the widow to admeasure the dower. A petition is to be filed, stating that the widow was not entitled to dower in the lands in which it was assigned, or that it was unduly assigned, and setting up title in the plaintiff. A summons is to be issued and served on the widow, who may appear and deny the title of the demandant, and show her right of dower, and that it was properly and duly assigned according to law. If it be found that the plaintiff has not good title to the premises, or that the widow is entitled to dower, and that the same has been assigned according to her right, judgment will be rendered allowing her to retain her dower; but if it be found that the plaintiff has good title to the lands, and that the widow is not entitled to dower, he will have judgment of seizin. If, upon proof of title in the plaintiff, it appear

¹ *Gove v. Cather*, 23 Ill. 634.

that the widow is entitled to dower, but that the same has not been duly assigned, a new assignment will be ordered. If the action is brought by a guardian, and judgment is obtained by the widow by collusion, his ward will not be bound thereby, but may have his action within three years after he comes of age.¹ These provisions of the Missouri statute have been adopted in Kansas.² So, in New Jersey, a guardian may resort to a writ of admeasurement, and if a collusive judgment be rendered, the heir, when he comes of full age, may have the dower admeasured as it ought to be by law.³

Compensation to the widow for improvements where dower is admeasured on account of an excessive assignment.

16. If the lands assigned by the infant heir exceed one-third of the whole, and they become more valuable than the remainder by improvements made by the widow, it is said that a writ of admeasurement will not lie, on account of such improvements,⁴ as that would be unjust, since she may have been induced to make them under a presumption that the assignment was proper. But there seems to be no objection to the admeasurement of the lands assigned, and to the heir taking the overplus, upon allowing for the value of the improvements of the excess of the lands assigned. Thus, if the assignment were of four acres, when the number should have been three, the heir might take back the fourth upon the admeasurement, and make compensation to the widow for the value of its improvements.⁵

17. It is also said to be doubtful whether, if an open mine of coals or lead were in the share assigned by the infant heir, so as to render the widow's third of greater value than the remaining two-thirds, a writ of admeasurement would lie.⁶ Upon this point, Mr. Roper remarks:⁷ "It is presumed, however, attending to what has been observed on the assignment of mines and minerals in a preceding page,⁸ and the necessity of estimating the yearly value of them as part of the value of the whole estate, that if no estimate of the mine in question had been made, there could be no objection to the heir's title to the writ of admeasurement to rectify the mistake, and to reduce the widow's assignment."

¹ 1 Rev. Stat. Misso 1855, pp. 677-8, §§ 40-44, 46.

² Comp. Laws Kansas, 1862, pp. 483-4, §§ 30-33, 35.

³ Nixon's Dig., p. 210, §§ 7-9. ⁴ Fitzh. N. B. 149 (C.) • 1 Roper, H. & W. 409.

⁶ Fitzh. N. B. 149 (C.)

⁷ 1 Roper, H. & W. 410.

⁸ Ibid. 396.

CHAPTER XXIX.

EVICION OF THE WIDOW FROM THE ESTATE ASSIGNED HER AS DOWER.

§ 1-3. Eviction from dower assigned
according to common right.

4-9. Eviction where the assignment
was contrary to common right.

10. Proceeding for new assignment.

Eviction from dower assigned according to common right.

1. EVERY assignment of dower according to common right,¹ by the heir, or by the sheriff on a recovery against the heir,² implies a warranty; but this warranty is special, namely, that the tenant in dower being impleaded by one who has title paramount, shall vouch, and recover in value, not according to that which she hath lost, but a third part of the two remaining parts of the land whereof she is dowable.³ And if it is but a particular estate which is recovered against the dowress, and which determines in her lifetime, she may re-enter into her original dower, and then it seems the heir may enter into the second dower, for she shall not have both.⁴

2. The old books are at variance whether this implied warranty arises only in respect of the privity between the dowress and the heir, or extends also to an assignment by the alienee of the husband or of the heir. In one case it is said that a widow endowed by the vendee of the husband may vouch the vendee, for cause of her endowment, and the reversion in him.⁵ But Mr. Park is of opinion that the current of authority is against this view.⁶ In Beddingfield's case,⁷ it is said: "There is a greater privity when a wife

¹ See ante, ch. iv., § 16.

² See ante, ch. xxi.

³ Bro. Dow. pl. 79; Co. Litt. 384 b.; Fitzh. N. B. 149 (M.); 4 Co. 122 a.; Perk. §§ 418-20; 9 Vin. Abr. 264; 1 Roll. Abr. 684, pl. 25; Gilb. Dow. 424; French v. Pratt, 27 Me. 381; French v. Peters, 33 Me. 396; Jones v. Brewer, 1 Pick. 314. But see 9 Co. 17 b., where it is said that she shall be newly endowed of other lands which the heir has, generally. Park, Dow. 275.

⁴ Bro. Dow. pl. 79.

⁵ 2 Roll. Abr. 743.

⁶ Park, Dow. 275.

⁷ Beddingfield's case, 9 Co. 17 b.

is endowed of the immediate estate which her husband's heir has by descent, than when she is endowed by a stranger, or of another estate; for if the wife be endowed of the immediate estate, descended to her husband's heir, if she be after impleaded, she shall vouch the heir, and shall be newly endowed of other lands which the heir has; but if the wife be endowed by the husband's or heir's alienee, if she be impleaded, she shall not vouch the alienee to be newly endowed; and that is the reason that when a woman brings a writ of dower against the alienee of the husband, &c., and he vouches the heir, the demandant may witness that the heir has lands descended to him in the same county, (for the original doth not extend to another county), and pray that she may be endowed of his estate, and that is for the benefit of her voucher to be newly endowed. Vide in 4 E. III., 36 b., and 6 E. III., 11 a., b. The tenant in a writ of dower vouched the heir of the husband, and the demandant testified that he by descent, &c., in the same county; and judgment was given against the heir if he had, and if not against the tenant.¹ In 6 E. III., 20 b., the wife of a stranger brought a writ of dower, and the tenant vouched the heir,² &c., the demandant shall not recover against the heir, because there wants privity. In 18 E. III., 36 b., in dower, the tenant vouched, and the vouchee vouched the heir of the husband of the demandant; the demandant testified that the heir had assets by descent in the same county; the demandant shall not recover against the heir, but against the tenant only, for there is not immediate privity betwixt the demandant and the heir, for the demandant shall recover against the heir only when the tenant in demesne vouches him. Vide Regist. Judic. 15; 16 E. III., Dow. 56; 3 El. Dy. 202."³ It seems, however, that if a woman is endowed by a disseizor, she shall have the warranty.⁴

3. The rule of the common law that a widow who has been evicted of her dower may be endowed anew of the remaining lands of her husband, is generally recognized in the United States.⁵ In an early case⁶ in Massachusetts, the court said: "It appears moreover

¹ 2 Roll. Abr. 751; Dy. 202, pl. 71; Winch, 81, 88; Hutt. 71, 72.

² *Quære*, what heir? Park, Dow. 276, note. ³ See 4 Kent, 69.

⁴ Fitzh. N. B. 149, note; Park, Dow. 277.

⁵ *Scott v. Hancock*, 13 Mass. 162, 168; *Holloman v. Holloman*, 5 Smedes & Marsh. 559; *Mantz v. Buchanan*, 1 Md. Ch. Dec. 202; *French v. Pratt*, 27 Me. 381; *French v. Peters*, 33 Me. 396; *St. Clair v. Williams*, 7 Ohio, pt. 2, 110.

⁶ *Scott v. Hancock*, 13 Mass. 162, 168.

that this mortgage was made by the intestate before his marriage with the petitioner, and this recovery against her by the mortgagee is a lawful eviction of her dower. In such a case she is entitled to be endowed anew, and she will then receive the full third part of all the real estate of her husband of which she was by law dowerable." So in Mississippi. "Where dower in property is allotted to the widow," said the court of that State, "and she fail to receive it or be evicted, her part must be again allotted, or compensation awarded her out of the estate."¹ This doctrine has been embodied in the statutes of Massachusetts,² Maine,³ Vermont,⁴ Michigan,⁵ Wisconsin,⁶ Minnesota,⁷ and Oregon.⁸ And this is the only remedy provided for the widow in such cases. She can not maintain an action upon the covenant of warranty to her husband.⁹ The following is the reasoning of the court upon this point in the case cited: "It is no subject of doubt, that an *assignee* is entitled to the benefit of all covenants running with the land.¹⁰ Nor is it doubted, where a covenant running with the land is divisible in its nature, as if the entire interest of separate parts of land pass to different individuals, that a right of action accrues to each party to recover his proportion of the warranty.¹¹ But a plain distinction is made between the holder of a part of the land, and the holder of a part of the estate; the former may vouch as assignee, or bring *warrantia chartæ*; the latter has the benefit of the warranty by aid prayer, or by the voucher of him who holds the remainder.¹² The same distinction is carried into the modern action of covenant. The *assignee*, upon whom is cast the benefit or the obligation of covenants, is he who holds the whole estate or term.¹³ These principles settle the present suit. The plaintiff could not vouch as assignee, nor have *warrantia chartæ* under the ancient law, nor can she sustain an action of covenant, because she does not hold the whole estate. The right of action on the warranty passes to the heirs, and her remedy is by a new assignment of dower."

¹ Holloman v. Holloman, 5 Smedes & Marsh. 559.

² Gen. Stat. Mass. p. 470, § 13.

³ Rev. Stat. Maine, 1857, p. 606, § 13.

⁴ Gen. Stat. Verm. p. 413, § 11.

⁵ 2 Comp. Laws Mich. p. 853, § 20.

⁶ Rev. Stat. Wis. 1858, p. 548, § 20.

⁷ Stat. Minn. 1858, p. 409, § 20.

⁸ Stat. Oregon, 1855, p. 407, § 20.

⁹ St. Clair v. Williams, 7 Ohio, pt. 2, 110.

¹⁰ 3 Ohio, 219; 5 Ohio, 156.

¹¹ 1 Paige, 455; 2 Paige, 78; Shep. Touch. 199; Co. Litt. 385 b., 386 a.

¹² Co. Litt. 385 a.; 4 Dane, 51; Wood's Convey. 373. ¹³ Doug. 183; 1 East, 502.

Eviction where the assignment was contrary to common right.

4. If the widow accept an assignment by the tenant contrary to common right, she takes the estate set apart to her subject to the charges and incumbrances existing thereon;¹ and if she be evicted therefrom, she is not entitled to be endowed anew of other lands of the husband.² "The law," observes Mr. Roper,³ "carries back the title of the widow to the husband's first seizin, in instances only where dower is accepted and assigned according to its own form and rule; but when a different form and rule are adopted by the consent of the widow, she claims in the nature of a purchaser, so that her estate commences from the assignment, and without relation to any antecedent period; for which reason she takes it with all the incumbrances affecting it in the possession of her husband, and it was her own folly to accept of such an assignment."

5. An exception to this rule occurs when the endowment is not made by the heir *in pais*, but dower is assigned by the sheriff upon a judgment obtained by the widow in a writ of dower, in the making of which assignment he has not followed the directions of the common law in delivering to her seizin of one-third part of each kind of her husband's property to which her right of dower attached. In this case her acceptance and acquiescence under the assignment will not debar her of any of the privileges which she would have been entitled to if her dower had been assigned in the form and manner which the common law requires. The assignment having been made under the authority of a court, it is to be considered as a legal and proper one while it remains uncorrected; and it therefore entitles the widow to the same advantages as if the assignment had been made of common right.⁴

6. Cases have arisen in the United States involving the application of the rule of the common law under consideration. In *Jones v. Brewer*,⁵ one parcel of the husband's lands had been, by agreement under seal between the guardian of the heirs and the widow,

¹ Vol. i., ch. xxix., § 7; post, ch. xxx., § 8; Park, Dow. 242.

² Co. Litt. 173 a., 32 b.; 1 Roper, H. & W. 412; 1 Washb. R. P., 2d ed., 224, 240; *Jones v. Brewer*, 1 Pick. 314; *French v. Pratt*, 27 Me. 381; *French v. Peters*, 33 Me. 396. See post, § 9.

³ 1 Roper, H. & W. 412.

⁴ 1 Roll. Abr. 684, pl. 50; Perk. § 330; Park, Dow. 242; 1 Roper, H. & W. 393, 413-14. See vol. i., ch. xxix., § 7.

⁵ *Jones v. Brewer*, 1 Pick. 314.

assigned to, and accepted by her in full satisfaction of her dower. The lands assigned proved to be under mortgage. It was held, that this was an assignment against common right, and that the widow was barred by it, as against an innocent purchaser of other lands of the husband. "This," said the court, "was an assignment against common right. An example of such an assignment in the books is where the heir, on the acceptance of the widow, assigns one manor in lieu of a third part of each of three manors. It is a principle in such cases, that she takes subject to all incumbrances by the husband. Co. Litt. 32 a., and note 197. If the estate assigned turns out to be more valuable than a third, she may still hold it; and on the contrary, if it proves less valuable, she must bear the loss. The important point in every case of that kind is, that the widow has accepted what could not have been lawfully assigned to her against her will. It is a voluntary release of a legal right for something supposed to be equivalent or more. The release shall stand, though the consideration fails. It is manifest that it would be highly injurious to the public, if an innocent purchaser should not be protected in such a case."

7. In Maine, this doctrine has been applied to a case¹ where dower was assigned under proceedings taken in the probate court. The assignment by the commissioners was of certain entire lots, instead of one-third of each, and included a parcel incumbered by mortgage in the execution of which the husband and wife had joined. The report of the commissioners was accepted without objection, and the widow entered into the actual possession of the estate assigned to her, and subsequently conveyed her interest in a part of the premises so set off. The remainder of the estate was sold by the administrator for the payment of debts. Several years afterwards the mortgage was foreclosed and the widow evicted from the parcel covered by it; but she continued in the enjoyment of the other portions of the estate assigned to her. It was decided, that under these circumstances the widow was not entitled to be endowed anew. "It is not denied by the plaintiff's counsel," said the court, "that if the heir should assign as dower an entire parcel of land in lieu of one-third of several parcels, and the dowress should accept the same so as to bind her, she would take it charged with the incumbrances; but it is insisted, that when the assignment is made by authority of the judge of probate, it is otherwise; that the widow

¹ French v. Pratt, 27 Me. 381.

is not at liberty to object to an assignment made by order of a court of competent jurisdiction.¹ The power of the judge of probate does not extend to an assignment of dower in lands of which the husband was not seized at the time of his death; or of lands of which the husband was so seized, when the right to dower is disputed by the heirs or devisees.² Judge Jackson, in his treatise upon Real Actions, page 327, in reference to a plea in bar to an action of dower, 'that her dower has been already assigned,' says, 'that it will vary in one case from the English forms. By our laws the judge of probate for the county where the estate of the husband is settled, may cause the widow's dower to be assigned to her by three freeholders appointed by him, and such assignment, being duly accepted and recorded in the probate office, is binding upon all persons interested. This authority of the probate court, it is presumed, would be confined to the real estate of which the husband died seized. The statutes contemplate the settlement of the estate among the widow and heirs or devisees of the deceased.' It would seem to follow, that such assignments of dower, being made by the consent of the heirs or devisees of the lands of which the husband died seized, it is only another mode of assigning dower by the heirs or devisees, and the dower so assigned is subject to all the incidents which would attach to an assignment made by them. If it were made 'according to common right,' and the dowress is evicted, she is entitled to be endowed anew; if 'against common right,' she takes the land charged with all incumbrances, and is concluded."

8. The Dower Act of Maine contains the following provision: "If a woman be lawfully evicted of lands assigned to her as dower, or settled upon her as a jointure, or be deprived of the provision made for her by will, or otherwise, in lieu of dower, she may be endowed anew, in like manner as though no such assignment or provision had been made."³ It was insisted in the case above cited, that the effect of this statute was to change the rule of the common law. But the court came to a contrary conclusion. It was further urged, that before a widow can be concluded by an assignment of dower against common right, she must not only accept the assignment, but must execute a release of all claim to the residue of the estate.⁴ This point was also adjudged against

¹ Ante, § 5.

² Rev. Stat. Me. ch. 95, § 3; *French v. Crosby*, 23 Me. 276; ante, ch. viii., § 18.

³ Rev. Stat. Me. ch. 95, § 14.

⁴ See ante, ch. iv., §§ 25-27. •

the widow. "No such release seems to be required," the court proceeded to remark, "where the assignment is made by the heir, and no good reason is pointed out for its necessity, where dower is assigned by the judge of probate. According to Lord Coke, in the previous citations, 'where dower is assigned by the heir, he may assign one manor in lieu of a third of three manors, which will be good, *if accepted by the widow.*' In the case of *Jones and ux. v. Brewer*,¹ the assignment of one entire parcel, instead of a third of each of several parcels, was made by release instead of the mode usually adopted; but it was not upon that distinction that the decision rests. The release of the widow was so qualified, that it was to have no other operation than would the acceptance of the same land under a different mode of assignment. The court say, 'the important point in every case of that kind is, that the widow has accepted what could not have been lawfully assigned to her against her will.' And when it is said to be a voluntary release of a legal right for something supposed to be equivalent or more, it is not understood that she was regarded as barred merely because she had given a written release as evidence of the assignment, more than if she had accepted the assignment properly made without the release. Before an assignment made by commissioners appointed by a probate court can have any validity, it must be accepted by the court, and a decree thereupon passed, and all become matter of record. Upon the question of acceptance, the heirs and the widow are entitled to be heard. She may claim to have the assignment made 'according to common right,' if it has not been done. She can object to an assignment 'against common right,' and there would certainly be great propriety in this, if the land assigned was incumbered, and she exposed to an eviction. If her objection should not prevail, and the report should be accepted, she would have the right of appeal, or might, perhaps, refuse to accept the assignment, and resort to her remedy by a direct demand upon, and action against the tenant of the freehold. But if she should interpose no objection to the assignment, suffer the commissioners' report to be accepted, a judgment thereon to be recorded, and under that should enter upon the enjoyment of the lands assigned, it is difficult to see wherein she has failed to accept the dower as effectually as she could do by her deed. She has become a party to a judgment of

¹ Ante, § 6.

a court of competent jurisdiction, which judgment by her acts she carries into full execution.”

9. In a subsequent case¹ in the same court, the doctrine was laid down, that when an assignment made against common right has been avoided in a portion of the land assigned, by virtue of a foreclosed mortgage given by the husband, the widow is restored to her original right of dower in such portion. The following is the reasoning upon which the court proceeded: “Although dower may be assigned to a widow in an estate conveyed by her husband during coverture in mortgage,² that assignment can not be valid against the title of the mortgagee, without an extinguishment of his mortgage.³ When the mortgage is foreclosed, his title commences from its date, and the widow can have dower only in that estate as in one conveyed by the husband, and can receive only one-third part of the rents and income; and an assignment by the heirs or by the probate court of the whole estate as dower, is avoided by a foreclosure of the mortgage. It is insisted, that an acceptance of that assignment by the widow is a bar to an action at law to recover her dower, and that it was so decided in the case of *French v. Pratt*.⁴ That case and the case of *Jones v. Brewer*,⁵ decide only, that an assignment of dower against common right and an acceptance of it, deprive a widow of her right to dower in lands in which dower was not assigned; not in lands in which dower was assigned. Nor are the principles or authorities on which those decisions were based applicable to a case like the present. The rule as stated by Lord Coke is, that if the heir endow the widow of certain lands, of which the husband died seized, in satisfaction of all dower, as well in the lands of his feoffees as in his own lands, the several feoffees shall take advantage of it, whether she be deprived of the benefit of such dower or not. This rule does not affect the relation existing between the widow and the owner of the lands in which dower has been assigned. If a widow be endowed against common right in several tracts of land, one of which had been conveyed in mortgage, by the foreclosure of which she is deprived of her dower in that tract, the owner of it can not plead to an action of dower commenced by her, that dower was assigned to her in other lands, in satisfaction of all dower. When thus deprived of a part of her

¹ *French v. Peters*, 33 Me. 396.

² Vol. i., ch. xxii.

³ Vol. i., ch. xxiii.

⁴ Ante, §§ 7, 8.

⁵ Ante, § 6.

dower by the act of the mortgagee, or his assignee, no injustice is done to him by considering the assignment of dower so far void as to enable her to recover her dower in the premises, as she might have done if her dower had been assigned according to common right. His estate is not subjected to any greater burdens on account of dower than it might have been had no such assignment been made. While no injustice is done to either by considering the parties after such avoidance of the assignment of dower, as remitted to their original rights, it appears to be the only mode in which the rights of the widow can be protected."

Proceeding for new assignment.

10. By the ancient common law, when the widow was sued by one having a superior title to the lands assigned her as dower, she was at liberty to vouch the tenant and recover against him in value in the same action.¹ It seems, however, in modern practice, that where the widow is evicted of the third part set off to her upon a writ of seizin by the sheriff, she may resort to a *scire facias* for a new assignment in the remaining lands.² It is said in a case in Maine, that the proper method of proceeding, is by action, in the same manner as if no assignment had been made;³ and this course would probably be sanctioned by the courts of most of the American States.

¹ Ante, § 1.

² Stearns, Real Act., p. 321 ; 1 Washb. R. P., 2d ed. 241.

³ French v. Pratt, 27 Maine, 381, 396-7.

CHAPTER XXX.

OF THE NATURE AND QUALITIES OF DOWER AFTER ASSIGNMENT.

§ 1. Assignment of dower vests the widow with the immediate freehold.

2-5. Her estate takes effect by relation from the death of her husband.

6. Charges and incumbrances created by the husband alone, defeated by the assignment.

7. Charges and incumbrances created prior to the marriage, paramount to dower.

8. If the widow accept an assignment contrary to common right, she takes subject to incumbrances.

9. Where the lands assigned are subject to a lease for years, the widow is entitled to the rent.

10-12. Whether a dowress can enter upon a lessee for years for condition broken.

13. Widow can not maintain assumpsit for previous use and occupation.

14. Hereditaments lying in appendancy.

15-20. Emblements.

21, 22. Leases for years executed by the widow.

23-31. Duties or services to which the widow is liable.

32, 33. Effect of the death of the widow.

Assignment of dower vests the widow with the immediate freehold.

1. As soon as an assignment of dower has been made to the widow by the sheriff, or by the owner of the land, and she has executed it by entry, she becomes seized of the immediate freehold,¹ either of the particular lands set out in dower, if assigned by metes and bounds, or of an undivided third part of the entirety, if assigned in common. All the incidents of a freehold tenure consequently attach upon her tenancy, and for all purposes of title in which the concurrence of the freeholder is requisite, or the existence of a particular estate of freehold is material to the deduction, her tenancy, to the extent of the lands assigned, must be taken into consideration accordingly. She must therefore join in making a tenant to the precipe, for the purpose of suffering a common recovery, otherwise the recovery will be void for her third part; and every

¹ Co. Litt. 31 a. And of some things which are entire, and can not be divided, although she shall be endowed of the profits only, yet she shall have the freehold of the third part; as of a mill Gilb. Dow. 371, 397.

adverse real action must be brought against her, as well as against the person who has the freehold in the remaining lands or undivided parts, if the entirety is sought to be recovered. As the owner of a vested particular estate, she is also capable of a release in enlargement of her estate, from any person competent in point of title and privity to make that release; and she is of course competent to alien her own interest to a stranger by any of the modes of conveyance available for transferring an estate of freehold.¹

Her estate takes effect by relation from the death of her husband.

2. Although, in point of tenure, a dowress holds of the heir,² yet, in point of title, she is *in* of the lands assigned to her, by her husband, and not by the person making the assignment.³ Although her right of entry is *suspended* until assignment made, her estate does not take its effect out of the ownership of the party assigning, but it is considered as a continuation of the estate of the husband; and although the heir entered and had an actual seizin between the death of the husband and the assignment of dower, yet that intervening seizin does not disturb the continuity of the wife's title, for, as soon as her dower is assigned, the law supposes her in by relation from the death of her husband, and does away all mesne seizin, or as Coke expresses it, "the law adjudgeth no mesne seizin between the husband and the wife."⁴ There is not, in contemplation of the law, any privity of estate between the dowress and the reversioner of the lands set apart to her.⁵ And it is by reason of this relation to the estate of her husband, that a remainder limited on an estate in dower (as where the heir endows his mother, and at the same

¹ Park, Dow. 339-40; 1 Roper, H. & W. 416; 2 Roll. Abr. 401; Co. Litt. 273 a.; Windham v. Portland, 4 Mass. 384, 388; Jones v. Brewer, 1 Pick. 314; Conant v. Little, 1 Pick. 189; Stevens v. Stevens, 3 Dana, 371; Fowler v. Griffin, 3 Sandf. S. C. 385; Lawrence v. Brown, 1 Seld. 394; Boyers v. Newbanks, 2 Carter (Ind.), 388; Matlock v. Lee, 9 Ind. 298; Childs v. Smith, 1 Md. Ch. Dec. 483; Norwood v. Marrow, 4 Dev. & Bat. 442.

² See post, § 5.

³ 36 Hen. VI. Dow. 30; Co. Litt. 241 a.; Gilb. Uses, 356, 395.

⁴ Co. Litt. 241 a.; 1 Greenl. Cruise, 195; 4 Kent, 62, 69; Conant v. Little, 1 Pick. 189; Baker v. Baker, 4 Greenl. 67; Stevens v. Stevens, 3 Dana, 371; Fowler v. Griffin, 3 Sandf. S. C. 385; Lawrence v. Brown, 1 Seld. 394; Powell v. Monson, 3 Mason, 368; Childs v. Smith, 1 Md. Ch. Dec. 483; Norwood v. Marrow, 4 Dev. & B. 442, 448; vol. i., ch. xiii., §§ 12, 13; ch. xv., § 9.

⁵ 1 Washb. R. P., 2d ed., 252, pl. 4; Adams v. Butts, 9 Conn. 79.

time limits a remainder over to another), is void; for, as the particular estate and the remainder limited thereon must form together but *one* estate,¹ the remainder limited on an estate in dower can not be good; as the estate in dower arises from, and has relation to that of the husband, and reference to his death; and the remainder proceeds from the heir, and arises from the grant made by him; so that such heterogeneous portions can never form *one* estate.² Another consequence of the wife's being *in* by her husband, and not by the heir, is, that an assignment of dower by the heir, is no consideration for anything moving from the wife; and therefore if the heir assign dower to his mother in exchange for other lands, it is said to be a void exchange.³

3. Upon the principle that the widow, after assignment of her dower, does not hold under the heir, it is held in New York, that she has no right to appear before the surrogate to show cause why the lands of which the husband died seized, including those assigned to her, should not be sold for the payment of his debts; the statute only giving such right to heirs and devisees and persons claiming under them. And service upon the widow of the order to show cause, as she had no right to appear and oppose the order for a sale, will not make her a party to the proceeding, nor are her rights affected by the decree.⁴

4. The effect of an assignment of dower upon the seizin as governing the descent, is often of vital importance to the deduction of titles, since such assignment does not merely turn the estate in the one-third into a reversion, but in consequence of the rule that the dowress is *in* by her husband and not by him who endowed her, the assignment has the effect of divesting, by relation, all mesne seizin in the one-third which had attached between the death of the husband and the time of the assignment.⁵ Hence, the one-third in dower would devolve to the person who at the death of the dowress should be the heir of the husband, without regard to mesne seizins; while the remaining two-thirds would descend to the heirs of the person who successively acquired a seizin, governed by the rules of descent as to estates in possession. The old law books abound

¹ See vol. i., ch. xi., § 16, *et seq.*

² Park, Dow. 340-1; Watk. Descents, 66, note; Finch's Law, 13; 1 Washb. R. P., 2d ed., 252-3, pl. 4.

³ Perk. § 272; Park, Dow. 341.

⁴ Lawrence v. Brown, 1 Seld. 394; Lawrence v. Miller, 2 Comst. 245.

⁵ Bro. Desc. pl. 19; Bro. Dow. pl. 87.

with cases on this head, and they uniformly establish the doctrine that the estate of the dowress, when assigned, takes effect by relation to the seizin of her husband.¹ And it was determined in a late American case, that as the assignment of dower to the widow displaces the seizin in fact of the heirs intervening between the death of her husband and the assignment, it is not competent for them to make partition during the intermediate period, of the lands so assigned.² But if the assignment become operative simultaneously with a judgment for the partition of the lands, it can not have the effect to defeat the latter; for in such a case, although the seizin of the heirs in the lands allotted for dower, becomes divested at the instant of the judgment, yet during that instant they were seized, and that is sufficient to support the partition.³

5. It is stated above (§ 2), that in point of *tenure*, a dowress holds of the heir, or person who has the reversion in the lands assigned to her, notwithstanding she is *in* by her husband and not by the heir.⁴ This point is said to have originated in the principles of the feudal system, according to which, as a woman was incapable of performing her proportion of the services, a tenure was created in the dowress, as to her third, to hold *of the heir*, immediately from the death of the ancestor; "and the reason," says Gilbert, "why the law created this as a tenure was, that the heir might be obliged to do the service for it during the time of its continuance,"⁵ as he was obliged to do for all lands which he had given out in tenure, as well as those he held in demesne; and had there been no tenure, it had been cut off from the manor during the life of the wife, when the heir was a tenant and no lord of the manor."⁶ The assignment of dower then, was, for purposes of tenure, a species of subinfeudation, and this tenure continued after the statute of *Quia Emptores*, since the heir does not part with the fee.⁷

¹ See Bro. Descent, pl. 19, 87; 9 Vin. Abr. Dower, (G. 2); 3 Leon. 156; Co. Litt. 15 a.; Gilb. Ten. by Watkins, 27; Park, Dow. 343.

² Fowler v. Griffin, 3 Sandf. S. C. 385.

³ Ibid.

⁴ Perk. § 424; Fitzh. N. B. 7 (F). See, also, post, § 25.

⁵ See Fitzh. N. B. 159 (A), where it is said, "if the wife be tenant in dower of any land, she shall not be distrained to do suit for that land which she holdeth in dower, if the heir have sufficient land in the same county to be distrained for the same. And if she be distrained, then she shall have a writ *pro exoneracione sectæ ad curiam*," &c. See the form of the writ there. Park, Dow. 344, note.

⁶ Gilb. Dow. 357, 364.

⁷ Ibid. 357; Park, Dow. 344; 1 Greenl. Cruise, 186, and note; 1 Washb. R. P., 2d ed., 253-4; 2 Bl. Com. 136; Wms. Real Prop. 109.

The assignment defeats charges and incumbrances created by the husband alone.

6. It results from the principles above set forth, that when dower has been assigned in conformity to the rules of the common law, the title of the widow will have such a relation to her husband's first and original seizin of the estate and the period of the marriage, as to defeat not only all charges and incumbrances which he alone made during the coverture after acquiring the estate,¹ but also all debts which he contracted during the coverture, in respect of which such property might be affected.² So, also, the widow holds the lands discharged from leases made by her husband during the coverture,³ and she is not bound by his release of a rent.⁴

Charges and incumbrances created prior to the marriage, paramount to dower.

7. But if the incumbrances were created by the husband before the marriage, by securities which did not prevent the right of dower from attaching to the estate, her endowment would not suspend the rights of the creditors against the third part of the lands assigned to her in dower, because her title having relation only to the time when the marriage was solemnized, is preceded by the securities of the incumbrancers, who are, therefore, entitled to a priority; consequently the lands assigned to her for her dower will be liable for the amount of their demands.⁵ Reference has been made, in a former part of this work, to the rule of the English law, entitling the widow, as against her husband's general estate, to have her dower exonerated from such incumbrances; and it was shown that in a portion of the United States this rule had been adopted, while in others it had been rejected.⁶ But even in the English courts, it is an established principle, that if the debts were not of the husband's contracting, as when the estate descended to him before the marriage, charged or incumbered, the widow must take her dower

¹ Fulwood's case, 4 Rep. 64 b.; Jenk. 36, pl. 69; Co. Litt. 33 a.; vol. i., ch. xxix.

² Co. Litt. 31 a.; Fitzh. N. B. 150 (Q); Gilb. Dow. 407-11; 1 Roper, H. & W. 411; Park, Dow. 351-2, 362.

³ Noy, 65; 1 Taunt. 410; vol. i., ch. xxix., § 2.

⁴ Co. Litt. 32 a.; 6 Co. 79 a.; 1 Roper, H. & W. by Jacob, 411, note.

⁵ 1 Roper, H. & W. 414; vol. i., ch. xxviii.

⁶ Vol. i., ch. xxiii., §§ 37-51.

cum onere; for his own personal property is not liable to answer for the debts of other persons, and consequently not, in the present instance, to exonerate the dowable estate from incumbrances so made upon it.¹

If the widow accept an assignment contrary to common right she takes subject to incumbrances.

8. It has been already shown, that where the widow accepts an assignment contrary to common right,² she claims in the nature of a purchaser, and her estate commences from the assignment, and without relation to any antecedent period; and therefore that she takes it with all the incumbrances affecting it in the possession of her husband.³

Where the lands assigned are subject to a lease for years the widow is entitled to the rent.

9. The widow, when endowed of lands upon which there is an existing lease for years, becomes the reversioner, and is entitled to the rent, or, as the case may be, to a proportion of it.⁴ If she is endowed only of part of the lands comprised in the lease, there will be an apportionment in law of the rent, and she may distrain for her part. And according to Brooke, if she be endowed of the third part of a rent service of 3*l.*, she shall distrain for 20*s.*, and the heir shall distrain for the other two parts of the rent.⁵

Whether a dowress can enter upon a lessee for years for condition broken.

10. It has been doubted whether a dowress can enter upon a lessee for years for condition broken.⁶ Previously to the statute

¹ 1 Roper, H. & W. 415.

² Ante, ch. iv., §§ 22-35; ch. xxix., §§ 4-9; vol. i., ch. xxix., § 7.

³ 9 Vin. Abr. 266, pl. 3; Co. Litt. 32 b., 173 a.; 1 Bright, H. & W. 388, pl. 97. See vol. i., ch. xxix., § 6, as to the effect of an election by the wife to be endowed between two seizins of her husband of the same estate.

⁴ 1 Roll. Abr. 678; Winch, 80; Cro. Eliz. 564; Anon. Owen, 32; vol. i. ch. xi., § 12; ch. xviii., § 6.

⁵ Bro. Avowry, pl. 139; Park, Dow. 346.

⁶ Park, Dow. 346-7.

of 32 Henry VIII., ch. 34, advantage of a clause of re-entry for the breach of a condition contained in a lease could only be taken by the lessor, his heirs, executors or administrators; the lessor being a party and privy to the contract, and the other persons legally representing him being privies in right. If, then, this privity had been destroyed, as by an assignment of the reversion, the assignee could not enter for a breach of the condition; the reason of which distinction the reader will find in Littleton.¹ Mr. Roper considers,² that as the above statute only alters the common law in favor of assignees or grantees, leaving the common law to operate upon estates created by act of law,³ if the husband, previously to his marriage, had granted a term of years of the dowable estate, with a clause of re-entry in the lease if the lessee committed waste, and after the husband's death and the endowment of his widow the lessee had broken the condition; the widow could not enter to determine the lease, because her estate being the creature of law, there was no privity between her, or the lessor, or his lessee.

11. But upon this point Mr. Jacob remarks:⁴ "The expression 'grantee or assignee' in the statute of 32 Hen. VIII., ch. 34, has received a liberal construction,⁵ and there is great reason to contend that it comprises a tenant in dower, as she derives her title from the lessor. Lord Coke, in saying⁶ that the statute does not extend to those who come in merely by act of law, instances only the case of the lord claiming for escheat or mortmain, or in respect of villeinage; and he gives the reason⁷ why the lord in those cases can not have the benefit of the statute, viz., that he comes in by title paramount, and is in merely in the post, and not by any limitation or act of the party. It seems, therefore, that this passage was not meant to apply to persons claiming under the lessor."⁸

12. It is clear, that if no clause of re-entry be inserted in such a lease, and it is declared that upon waste committed by the lessee, the lease shall determine and be void, then the widow may enter, because the lease is not merely voidable upon entry, as in the case first supposed, but it is *ipso facto* void without any entry.⁹

¹ Litt. § 347.

³ Co. Litt. 215 b.

⁵ *Isherwood v. Oldknow*, 3 M. & S. 382.

⁷ 3 Co. 62 b.

² 1 Roper, H. & W. 425.

⁴ 1 Roper, H. & W. 425, note.

⁶ Co. Litt. 215 b.

⁸ See 4 Co. 50 b.

⁹ 1 Roper, H. & W. 425; 1 Bright, H. & W. 393, pl. 10; Park, Dow. 347; Gamock v. Cliffs, 1 Leon. 60, 61.

Widow can not maintain assumpsit for previous use and occupation.

13. While it is established, as we have seen, that upon assignment of her dower and entry thereunder, the seizin of the widow relates back to the death of her husband, it is equally well settled, that she can not maintain an action for use and occupation against the tenant who has enjoyed the lands assigned to her since her husband's death, although no damages were allowed to her in the proceeding in which she recovered her dower.¹

Herediments lying in appendancy.

14. It has been held, that if a feme is endowed of a third part of a manor to which franchises are appendant, she shall not have the third part of the franchises, for these are not divisible; otherwise if she has the whole manor in dower.² If a woman is endowed of a manor *eo nomine*, to which common is appendant, she shall have common appendant to her third part; but it is said that if she is endowed of two acres of land, parcel of the manor, in allowance of all the manor, she shall not have common appendant unto these two acres; for during the time they are in possession of the woman they are not parcel of the manor, and the common is appendant unto the *manor*.³

Emblements.

15. If the husband sow the ground and die, and the heir assign the land sown to the wife for her dower, she is entitled to the crop growing thereon, and not the executor of the husband.⁴ This is an

¹ Thompson v. Stacy, 10 Yerg. 493; Sutton v. Burrows, 2 Murph. 79; Andrews v. Andrews, 2 Green, 141; 1 Washb. R. P., 2d ed. 252, pl. 3.

² Bro Dow. pl. 102. But see Cro. Jac. 620, 621.

³ Perk. § 344; Park, Dow. 349. See vol. i., ch. x., § 3.

⁴ 2 Inst. 81; Fisher v. Forbes, 9 Vin. 373, pl. 82; 2 Eq. Abr. 392; Dyer, 316 a., pl. 2; Parker v. Parker, 17 Pick. 236; Ralston v. Ralston, 3 G. Greene (Iowa), 533; Kain v. Fisher, 2 Seld. 597, 598. In a case determined in the court of common pleas of Allen county, Ohio, it was held, that "when, in a *judicial proceeding*, dower is assigned by metes and bounds, the dowress does not, in Ohio, become the owner of crops growing thereon." This decision was placed upon the ground, chiefly, that "in Ohio, the principle has been determined, that where a title passes by judicial proceeding, the crops thereon are to be deemed personalty, and do not belong to the person thereby acquiring such title." Davis v. Brown, 4 West. Law Month. 272, per Lawrence, J.

instance of the peculiar favor shown to the tenant in dower above any other tenant for life, the latter never being put into possession of lands which are sown.¹

16. In a case in Massachusetts, where land of which a husband died seized, was assigned to his widow for her dower, by commissioners appointed by the probate court, the heir and the widow assenting to such assignment at the time it was made, and the report of the commissioners was subsequently accepted by the probate court, it was held, that the widow had a defeasible freehold estate in the land from the time of the assignment, which the acceptance of the report by the probate court rendered absolute; and that after such assignment the widow was entitled to enter and cut and carry away the growing crops sown by the heir prior to the assignment, although such entry was made previously to the acceptance of the report.²

17. But the right to growing crops does not attach in favor of the widow until after her dower has been assigned.³ If, before assignment, she receive the fruits and grass growing on her husband's lands at the time of his decease, she is liable to the heir for their full value, and can not retain one-third on account of her right of dower in the estate.⁴

18. With respect to crops sown by the widow on the lands assigned for her dower, her right to them is indisputable, since by the statute of Merton,⁵ a tenant in dower is empowered to dispose of the corn growing upon her estate at the period of her death; that Act having been passed to remove the doubt which previously existed upon the subject. That doubt was founded upon this reasoning, that the widow being entitled to an assignment of dower immediately after her husband's death, and having had the benefit of the corn then growing upon the third part of the lands assigned to her, if any there happened to be,⁶ it was thought the advantages received by her at the commencement of her estate, should be a satisfaction of those of the same kind which she would otherwise have been entitled to when her estate expired. This Act places the widow in the same situation with respect to such emblements as other tenants for life. Her power of disposition under the statute, therefore, does not merely extend to corn growing at the time of her death,

¹ Park, Dow. 354-5.

² Parker v. Parker, 17 Pick. 236.

³ Budd v. Hiler, 3 Dutch. 43.

⁴ Kain v. Fisher, 2 Seld. 597.

⁵ 20 Hen. III., ch. 2; 2 Inst. 80. See vol. i., ch. i., §§ 24, 25.

⁶ Ante, § 15.

but to roots planted, and to other annual and artificial profits, such as hemp, flax, and hops, although growing upon ancient roots, and to other things which are yearly produced by the industry of man.¹ If she omit to dispose of them, they will belong to her executor or administrator, who may retain possession of the lands until the corn, &c., can be reasonably carried away.²

19. It follows from a tenant in dower being in the same situation as a tenant for life in regard to emblements, that the same principles will regulate her right to them as are applicable to other tenants for life. The fundamental reason for admitting such right is to encourage husbandry, by allowing the tenants a full compensation for their labor and expense in tilling, manuring, and sowing the lands, and this principle is the basis of the following cases: If there be two tenants in common in fee of lands, and the one marry and die, and his widow after the endowment, and the surviving tenant in common, sow the lands, and she die before the corn is cut, her executor or administrator will be entitled to the corn in common with the other tenant.³ So, also, if the widow, after assignment of dower, sow the lands and marry, and her second husband, after appointing executors, die before the crop is severed, his surviving widow will be entitled to it. But his executors, and not the widow, will be entitled to the crop if it be sown by the husband, because he incurs the expense of sowing it.⁴

20. The statute of Merton seems to have been generally regarded as common law in the United States,⁵ and in some of them its provisions have been expressly re-enacted.⁶

Leases for years executed by the widow.

21. If the dowress lease the lands which she has in dower, for years, and die, her executor shall have the rent in arrear at her

¹ Co. Litt. 55 b., note (3); 1 Roll. Abr. 728; Cro. Car. 515; Keilw. 125; Perk. § 522; 2 Danv. 766, pl. 27; Bro. Emblements, pl. 22.

² Keilw. 125, pl. 84; 1 Roper, H. & W. 426; 1 Bright, H. & W. 393-4; Park, Dow. 355.

³ Perk. § 523.

⁴ Perk. § 522; Co. Litt. 55 b.; Bro. Emblements, pl. 26; 1 Roper, H. & W. 427; 1 Bright, H. & W. 394; Park, Dow. 355.

⁵ 1 Greenl. Cruise, 186, note.

⁶ 1 Rev. Stat. N. Y., p. 743, § 25; Va. Code, 1849, p. 476, § 14; Rev. Stat. R. I. 1857, p. 506, § 24; Rev. Code N. C. 1855, p. 603, § 9; Dig. Stat. Ark. 1858, p. 457, § 51.

death, and not the heir, for he is a stranger to the lease, and by her death it is terminated.¹

22. In a case in New Hampshire, the heirs of the husband had entered into an agreement with the widow to "cut and haul out" to a certain place annually, a stipulated quantity of hard wood for her use, so long as she would give up to them the exclusive occupancy of the buildings of which she was dowable, and in full satisfaction of her claim, as dowress, to cut wood upon the estate. She afterwards leased to one of the heirs the only part of the land assigned to her on which wood of that quality grew; and after that made a contract with those who had purchased the buildings of the heirs, that she would not disturb them in their possession. She also, for one year, compounded for a sum of money with one who had agreed with the heirs to cut and haul the wood. It was held, that these acts did not impair her rights under the contract with the heirs; and that they were required by it to furnish the wood, whether it could be obtained on the land assigned to her or not.²

Duties or services to which the widow is liable.

23. The duties or services to which the widow is liable in respect of her dower, are founded upon her title to the estate. Her interest, as we have seen,³ is a continuation of her husband's seizin; she is consequently liable, as standing in his place, to one-third of all the duties and services to which the estate was subject in his possession, and for which one-third she is answerable to the person entitled to the reversion of the property.⁴

24. If she be endowed of lands of which her husband was tenant in common, she must stock the land proportionally with the other tenants in common;⁵ and it is apprehended she must contribute towards the repairs.⁶ But whether the reversioner can maintain a bill in equity to compel a dowress who has had lands specifically assigned to her, to repair, is probably doubtful.⁷ In *Wood v. Gaynon*,⁸ a bill to compel a tenant for life to repair, or to have a receiver

¹ Bro. Rents, pl. 16; Bro. Leases, pl. 19; Park, Dow. 356; *Stockwell v. Sargent*, 37 Verm. 16.

² *Page v. Page*, 20 N. H. 128.

³ Ante, § 2.

⁴ 9 Rep. 135 b.; Perk. §§ 424, 425, 427; 1 Roper, H. & W. 427.

⁵ Gilb. Dow. 397.

⁶ Of the writ *De reparatione facienda* between tenants in common, &c., see Fitzh. N. B. 295. And see 1 Vern. by Raithby, 219, note.

⁷ Park, Dow. 356.

⁸ *Wood v. Gaynon*, Amb. 395.

appointed with directions to repair, was dismissed, as being without precedent.¹ But it seems that in taking accounts, a tenant for life, though without impeachment of waste, may be charged with sums for the repairs of houses on the estate.²

25. An instance of the attendancy of the widow upon the reversion, is the case where a rent reserved upon an estate tail granted to the husband has expired by reason of his death without leaving issue;³ there, the widow being dowable of the estate tail notwithstanding its determination, the law decided that, in respect of one-third of the estate assigned to her for her dower, she should be attendant upon, and pay to the donor one-third of the rent originally reserved.⁴ So, if the husband die without heirs, and the land escheat, the widow holds her dower of the lord, rendering to him a third of the rents and services.⁵ In other cases, the dowress, in point of tenure, holds of the heir.⁶ And, according to the principles of the common law, she must contribute to rent services.⁷ Thus, if the heir "hold over by rent, she is attendant upon him by the rate and proportion of the rent which the land assigned unto her should bear."⁸ It is said, also, that "if there be grandfather, father, and son, and the grandfather die, and the father enter and assign dower to the grandmother, who afterwards surrenders to him, paying ten pounds per annum, and the father dieth, and the wife is endowed of the land, she shall pay to the grandmother so much of the rent as belongs to her proportion in dower."⁹ And it is laid down in the old books, that a woman who is endowed of the third part of the profits of an office, shall contribute a third part of the charge of the office. "A woman shall be endowed of a bailiwick as to have the third part of the profit thereof, and in such

¹ An early Connecticut statute authorized a resort to legal proceedings to compel tenants in dower to make repairs. But this statute applied only where dower had been assigned in the manner prescribed by law. Consequently, where the heirs and widow had made partition of the estate by mutual agreement, and a certain tract of land and the buildings thereon had been apportioned to the widow as her dower, it was held, that a suit by the heirs to compel the widow to keep the premises set apart to her in tenantable repair, could not be maintained. *Beers v. Strong*, Kirby's (Conn.) Rep. 19, (1786.) See Stat. Conn. 1854, p. 382, § 19.

² See *Parteriche v. Powlet*, 2 Atk. 383.

³ Vol. i., ch. xviii., § 3.

⁴ Co. Litt. 241; Perk. § 431; 9 Vin. Abr. 268, pl. 5, 6; 1 Roper, H. & W. 428.

⁵ 9 Vin. Abr. 268, pl. 7, 9.

⁶ Fitzh. N. B. 7 (F); Co. Litt. 241 a., 31 a., note (2); Park, Dow. 344-5; ante, § 5.

⁷ Park, Dow. 345, 356.

⁸ Perk. § 424; Co. Litt. 31 a., note (2), 241 a.

⁹ Hughes, Writs, 173; Park, Dow. 356-7.

case she shall be contributory to the third part of the charge of exercising the office."¹

26. Upon the principle applicable to these cases, if the estate be subject to incumbrances paramount to the right of dower, and they are of such a nature as not to entitle the widow to have them satisfied from her husband's general estate, she will be obliged to keep down one-third of the interest, as has been before shown.²

27. The liability of the widow to contribution for part of the duties reserved out of the dowable estate is, as before observed, founded in justice; on the principle that the owner of two-thirds of the estate should not be obliged to pay over the whole of such reservation, but that the proprietor of the other third should contribute *pro rata*. It is also equal justice, that if the heir or his grantee become discharged of the render or duty, it should operate in favor of the widow. Accordingly, if the husband's estate, upon its creation, were subject to a rent, and the reversioner or donor of the estate, or the person to whom it is payable, release the whole or part of it to the heir, the widow will also hold her dower discharged from it, a third of which she was previously liable to pay to the heir.³

28. It is a rule of general, if not of universal application, that it is incumbent upon a tenant for life to pay all taxes assessed upon the lands subject to the tenancy during his life.⁴ And there is nothing peculiar to a tenancy in dower which distinguishes it, with respect to charges of this character, from other estates of freehold for life.⁵ In some of the States, it is expressly provided by statute, that taxes assessed upon lands assigned to the widow for her dower shall be paid by her.

29. Where certain apartments in a dwelling-house are set apart to the widow, and the residue are in the possession of the heir at law, or his grantee, the taxes and assessments are the subject of equitable apportionment between her and such heir, or grantee.⁶

¹ Perk. § 342.

² Vol. i., ch. xxiv.

³ Co. Litt. 241 a.; Perk. § 430; Bro. Tenures, 252 b., pl. 33, 82; 1 Roper, H. & W. 428-9.

⁴ 1 Washb. R. P., 2d ed., p. 96, pl. 28; Varney v. Stevens, 22 Me. 331, 334; Stetson v. Day, 51 Me. 434; Cairns v. Chabert, 3 Edw. Ch. 312; McMillan v. Robbins, 5 Ohio, 28.

⁵ Whyte v. Nashville, 2 Swan (Tenn.), 364; Graham v. Dunigan, 2 Bosw. S. C. 516.

⁶ Graham v. Dunigan, 2 Bosw. S. C. 516. See Linden v. Graham, 34 Barb. 316.

But no such apportionment can be made, in the absence of legislation providing therefor, by the assessors or collectors of taxes, or other public authorities, so as to enable either to pay a portion of the amount assessed, and discharge his or her part of the premises from the charge or incumbrance. If, in order to relieve her own share of the premises from the charge, prevent the accumulation of a percentage imposed as a penalty for the nonpayment, and save the premises from sale for taxes or assessments, the widow pay the whole amount, she may recover from the heir at law, or his grantee, his just share or proportion of the amount paid, with interest from the time of such payment. Such share or proportion of the taxes is to be ascertained by taking into view the relative annual value of those parts of the premises held by each respectively; and, in dividing the assessment, the nature of the improvement for which the assessment is made should be considered, having regard, also, to the benefit resulting therefrom, and its probable permanency, and also the age of the tenant in dower, and the probable duration of her estate.¹

30. It has been held, that the annual water rate in the city of New York, for the use of the Croton water, is subject to the same division. But a charge for Croton water, separately and specifically made for a particular use, which use is exclusively confined to the apartment of one of the parties, should be borne in whole by such party.²

31. The principle above considered applies to all incidental charges upon the dower lands which accrue during the continuance of the widow's estate. It is held, therefore, that she is bound to reimburse the proper corporate authorities for moneys expended by them in constructing a foot pavement in front of premises which have been assigned to her for her dower, the requisite notice having been first given her to construct the pavement herself.³ And this is a charge which must be borne wholly by the dowress, although the party having the reversion may receive the benefit of the improvement after her death. "When the charge is upon the entire estate of which the husband died seized," said the court in the case last cited, "the dowress is, of course, only bound for one-third part of it, because she takes only a third part of the estate; but where, as in the case under consideration, the charge falls

¹ *Graham v. Dunigan*, *supra*.

² *Graham v. Dunigan*, 2 Bosw. S. C. 516.

³ *Whyte v. Nashville*, 2 Swan (Tenn.), 364.

exclusively upon a part of the estate which has been assigned in dower, she is separately and exclusively liable for its discharge."

Effect of the death of the widow.

32. As the widow has but a life estate in the realty allotted to her, it follows, that upon her death, the heir or party owning the inheritance is entitled to the immediate possession. A sale under an order of the probate court, by the administrator of a deceased widow to whom dower had been assigned, "of the dower interest of the widow," passes nothing.¹ So, the lease of a widow's dower by her guardian becomes inoperative by her decease. If an heir in possession under such lease, refuse, on demand, to let the other heirs into joint occupancy, they may maintain ejectment and recover to the extent of their right, including rents and profits. And if her administrator receive and hold the rent, the heirs may collect it of him.² Ordinarily, also, the incidents to her estate in dower, cease with her estate in the land. As where a right of way was set out as appurtenant to dower lands across the lands of the husband, it ceased with the determination of her estate.³ But where a certain part of a house was set out as dower, with certain easements in other parts of it as appurtenant, and the parts not set out to the widow were sold, and described as being all the estate not assigned to her, it was held, that at her death these easements continued appurtenant to the dower portion in the hands of the heirs.⁴

33. A person holding an estate in dower under the widow, can not, after the termination of the estate, set up a claim for betterments against the reversioner.⁵ But by statute in Rhode Island, if a widow erect a fence on or around her dower land, her executor or administrator may enter thereon and remove the same, doing as little damage as may be to the freehold, at any time within six months after her death.⁶

¹ *Holmes v. McGee*, 12 Smedes & Marsh. 411. A widow is estopped to set up against the owner of the reversion a paramount title acquired by her. Nor can a purchaser from her be allowed to do it. *Kirk v. Nichols*, 2 J. J. Marsh. 470; 1 Hiliard, R. P., 2d ed., p. 184, § 34. The possession of the dowress, where dower has been assigned, is not adverse to the title of the owner in fee. *Chairs v. Hobson*, 10 Humph. 354.

² *Stockwell v. Sargent*, 37 Verm. 16. See ante, § 21.

³ *Hoffman v. Savage*, 15 Mass. 130.

⁴ *Symmes v. Drew*, 21 Pick. 278; 1 Washb. R. P., 2d ed., p. 254, pl. 5.

⁵ *Maddocks v. Jellison*, 11 Maine, 482; *Wiltse v. Hurley*, 11 Iowa, 473. See *Bent v. Weeks*, 44 Maine, 45.

⁶ Rev. Stat. R. I. 1857, p. 506, § 24.

CHAPTER XXXI.

FORFEITURE OF DOWER.

§ 1-4. Forfeiture for crime.

5-19. Tortious conveyances.

20-30. Waste at common law.

31-49. Waste in the United States.

50-52. Non-payment of taxes.

Forfeiture for crime.

1. BY the common law, if a woman is attainted of treason, murder, or felony, she will thereby lose her dower; but if she is pardoned before the death of her husband she will be restored to her dower.¹ In an ancient reading by Philips, it is held, that if the wife be attainted, and then the husband purchase land and alien it, and then the wife is pardoned, she shall have dower of that land. And he cited Mansfield's case, adjudged in the 28th of Elizabeth. In that case, a jointure was conveyed to the wife before the coverture, and during the coverture the husband purchased other lands which he subsequently aliened, and died. The wife was evicted from the lands which she had in jointure, and afterwards recovered dower of the lands which had been purchased and aliened by her husband at the time when she was barred of her action of dower. The cases seem to have proceeded upon the ground that the bar is to the action only, and not to the title.²

2. Other causes of forfeiture, penal in their nature, are stated in the old books. Thus, it is laid down by Lord Coke, that "if a woman say she is conceived with child by her husband whilst he lived, and in truth is not, whereby the next heir is disturbed, she shall lose her dower, if she acknowledge the same before the justices."³ By an Irish statute (6 Anne), if a woman, by subtle means, or secret insinuations and delusions, threats and menaces, prevail on the son and heir apparent of any person having lands of the yearly value of 50*l.*, or personal estate of the value of 500*l.*,

¹ Co. Litt. 33 a. ; 13 Co. 23, in Menvil's case; Perk. § 349.

² Park, Dow. 222.

³ 2 Inst. 436.

to marry her, she is rendered incapable of demanding any dower or thirds, or other interest out of the real or personal estate of her husband.¹ In a case in which this statute was brought under consideration, it was held, that being in the nature of a penal enactment, it must be construed strictly, and that when pleaded to a writ of dower, the jury must expressly find that subtle means, &c., were used; for they are not to be presumed from the circumstance of the marriage being private, without the father's consent.²

3. It is said by Perkins, that "although a woman will not go to her husband when he is wounded, in a county in which he does not dwell, and notwithstanding that he dies of the same wound, and she will not bring an appeal of his death, yet she shall be endowed.³ But *quære*, if the husband lie sick in the same house in which he and his wife are dwelling, and she will not come to him, if she shall have dower."⁴ In a note to this section, Mr. Greening observes: "Highly reprehensible as such conduct would be in a wife, the temporal law could take no cognizance of it; and therefore there is not (at least *now*) the slightest foundation for supposing that the act would be a forfeiture of her dower."⁵

4. Except in cases of treason, the principles of the English law relative to forfeiture for crime, appear to have no application to this country.⁶ "For the small number of felonies in our criminal code," says a writer of acknowledged authority, "specific punishments are provided by statute; among which punishments are neither corruption of blood nor forfeiture of dower."⁷ The Constitution of the United States confers upon Congress power to declare the punishment of treason, subject to a limitation that no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.⁸ The Act of Congress of April 30, 1790,⁹ expressly provides, that no conviction or judgment for the offences therein enumerated, including treason, shall work corruption of blood or any forfeiture of estate. This

¹ Park, Dow. 227.

² Kent v. Whitby, 3 Bro. P. C. 487.

³ Perk. § 364.

⁴ Ibid. § 365.

⁵ It was held in a case in Vermont, that though the wife separate from the husband by reason of family discord, yet such separation is no forfeiture of her right of dower or her share of the personal estate, though she may have no justifiable cause of separation. Thayer v. Thayer, 14 Verm. 107.

⁶ See vol. i., ch. xxix., § 54.

⁷ Stearns, Real Act. 287.

⁸ Art. 3, § 3, subdivis. 2. See vol. i., ch. xxix., § 53.

⁹ Act of April 30, 1790, § 24; 1 U. S. Stat. 117; Brightly's Dig. p. 221, § 103.

enactment is still in force;¹ but by the Act of July 17, 1862, provision is made for the seizure and confiscation, by proceedings *in rem*, of the estates of persons engaged in rebellion against the Government of the United States.² An inchoate right of dower can scarcely be considered as within this statute; as such a right is not an estate, and is not the subject of grant or conveyance.³ But if the validity of the law shall be sustained, proceedings regularly taken under it against lands assigned for dower, would, it is supposed, operate to divest and transfer the right of the widow precisely as they would any other freehold for life.

Tortious conveyances by the widow.

5. The widow, having only a freehold interest in the third part of her husband's freehold estates, can not legally dispose of it for a longer period. By the ancient common law, if she aliened in fee, or for the life of another, or in tail, the heir might, after her death, have recovered the land by a writ of entry.⁴ But where she aliened by feoffment, and the feoffee died seized, whereby the entry of the reversioner was tolled, he could have no writ of entry until after the death of the dowress. But by the statute of Gloucester,⁵ it was enacted, "that if a woman sell or give in fee, or for term of life [of another] the land that she holdeth in dower, the heir, or other to whom the land ought to revert after the death of such a woman, shall have present recovery to demand the land by a writ of entry⁶ made thereof in the chancery."⁷

6. Notwithstanding this statute, if the dowress aliened in fee

¹ By the Act of July 17, 1862, § 1, every person found guilty of treason, shall suffer death, and all his slaves, if any, shall be declared and made free; or, at the discretion of the court, he shall be imprisoned for not less than five years and fined not less than ten thousand dollars, and all his slaves, if any, shall be declared and made free. Brightly's Dig. Supp. p. 1161, § 4.

² Act of July 17, 1862, §§ 5-8; 12 U. S. Stat. 590; Brightly's Dig. Supp. 1234-5, §§ 28-31.

³ Ante, ch. i.

⁴ Called a writ of entry *ad communem legem*, to distinguish it from the writ of entry *in casu proviso*. Fitzh. N. B. 207; Park, Dow. 361. This writ was abolished by the 3 & 4 Wm. IV., ch. 27, § 36. 1 Bright, H. & W. 390, note.

⁵ 6 Edw. I., c. 7.

⁶ Called a writ of entry *in casu proviso*. Fitzh. N. B. 205 (M). This writ was abolished by the 3 & 4 Wm. IV., c. 27. 1 Bright, H. & W. 391, note.

⁷ 2 Inst. 309. And see Shep. Touch. 125, 148; Park, Dow. 361, and note.

with warranty, and died, the warranty descending upon the reversioner, barred him, as the statute of Gloucester did not provide against collateral warranty by the dowress. But by the 11 Hen. VII., c. 20, alienations, releases, and confirmations, with warranty, by a tenant in dower, either alone, or with a second husband, except for the term of her own life, are made a forfeiture of her estate, and the same are declared void.¹ The statute, however, saves to the widow the right of entry upon the heir or reversioner, after the death of her second husband, where the alienation was made during coverture.

7. It is said to have been adjudged, that if a woman who has title of dower, enter and levy a fine before she is endowed, it is within the forfeiture of the statute, although she is not tenant in dower.²

8. By recent statute in England, the tortious effect of feoffments has been taken away, and no mode of alienation seems now to exist which would cause a forfeiture of the estate.³

9. The rule inflicting upon a tenant for life forfeiture of his estate, as a penalty for his tortious conveyance, had its origin in the feudal system, according to which, an alienation in fee by the tenant amounted to a renunciation of the feudal relation, and worked a forfeiture of the vassal's estate.⁴ But even at common law, a mere grant or release by the tenant for life, passed only what he might lawfully grant. It is manifest, therefore, that this ancient rule is inapplicable to conveyances in this country, and in fact it has received but little countenance in the American courts. In many of the States, the feudal notion of forfeiture is expressly renounced, and the doctrine placed upon just and reasonable grounds. As a general rule, any conveyance by tenant for life, in the United States, of a greater estate than he possessed or could

¹ And see 32 Hen. VIII., c. 36, § 2; Co. Litt. 365 b.; Litt. §§ 725-727; Shep. Touch. 194, 15.

² Per Rhodes, J., in *Barker v. Taylor*, 2 Leon. 168; Park, Dow. 362. A widow may grant leases for years, and upon her death her personal representative will be entitled to the rent in arrear. Ante, ch. xxx., § 21.

³ 8 & 9 Vict. c. 106; 7 & 8 Vict. c. 76; 1 Bright, H. & W. p. 155, pl. 18; Ibid. p. 391, pl. 5.

⁴ "If a tenant should do anything to the disinherison of his lord, and should be convicted of it, he and his heirs shall, according to the law, for ever lose the fee held of such lord." Beames' Glanville, book 9, ch. 1, p. 220. See Litt. § 415; 2 Bl. Com. 274.

lawfully convey, passes only the title and estate with which he was actually invested.¹

10. There is to be found in some of the earlier American cases, however, a recognition of the principle formerly applied in the English courts. A case is referred to by Mr. Dane, as holding that a conveyance in fee in Massachusetts, in 1784, worked a forfeiture of the estate.² A decision made in the same State in 1821, contains a dictum to the same effect.³ Shortly afterwards, it was held, that a deed of bargain and sale, acknowledged and recorded, made by tenant for life, followed by a reconveyance with special warranty, and then a mortgage by the tenant, she remaining in possession, did not work a discontinuance.⁴ But the court observed, "that a bargain and sale, covenant to stand seized, or release, with a general warranty annexed, may produce a discontinuance when the warranty descends upon him who hath right to the lands." This point has been set at rest in Massachusetts, by a statute which provides, that a conveyance by tenant for life of a greater estate than he possessed, shall have no effect except to pass to the grantee all the estate which the tenant might lawfully convey.⁵

11. It was held in a case in Maine, that if a tenant by the curtesy make a conveyance of the estate in fee, he thereby creates a forfeiture of his estate, and the reversioner has an immediate right of entry.⁶ But a statute similar to the Massachusetts Act above referred to, has been in force in Maine for a number of years.⁷

12. In New Jersey, the provisions of the ancient English statutes upon this subject, have been substantially adopted. If a dowress, being sole, discontinue or alien, with or without warranty, or suffer any recovery by covin, the alienation shall be void, and the next owner may enter immediately as if she were dead. If she alien with her husband, the forfeiture ceases with his life.⁸

13. It was held in Pennsylvania, as early as in 1798, that a statute making the registry of a deed equivalent in effect to livery, did not give to the recorded deed of a tenant by the curtesy, the

¹ 4 Kent, 83-4; Wms. R. P. 25, note; 1 Washb. R. P., 2d ed., 91, note; Ibid. 198, pl. 6.

² Dane's Abr. 11-13.

³ Grant v. Chase, 17 Mass. 443, 446.

⁴ Stevens v. Winshid, 1 Pick. 318, 328.

⁵ Gen. Stat. Mass. 1860, ch. 89, § 9.

⁶ French v. Rollins, 21 Me. 372.

⁷ Rev. Stat. Maine, 1840-41, ch. 91, § 9; Rev. Stat. 1857, ch. 73, § 5.

⁸ Nixon's Dig. p. 117, §§ 7-9.

operation of livery in forfeiting the estate. The deed was a quit claim in regard to the covenants; but the operative words of conveyance were "grant, bargain, sell, alien, release, enfeoff, and confirm."¹ "We entertain no doubt on the present question," said M'Kean, C. J. "The legislature has, at various periods, and on a variety of subjects, departed from feudal ceremonies and principles, in relation to the transfer and descent of property; but in the present instance the Act of Assembly meant only to give to a grant of lands, a greater effect upon the estate, on recording the deed, than could previously have been enjoyed without livery of seizin. It never contemplated that circumstance as an instrument to work a forfeiture, on the common law doctrine of alienation by tenant for life, or years." "From the words of the Act of Assembly," added Shippen, J., "it is plain, I think, that the legislature did not mean to work the forfeiture of a particular estate, by the provision for recording deeds. In allowing deeds recorded the same force and effect as feoffments with livery, the intention is expressly restricted to 'giving possession and seizin, and making good the title and assurance of lands, tenements, and hereditaments.' It is therefore merely a facility and benefit extended to the grantee."²

14. Chancellor Kent considers, that in Virginia, under the statute of 1783, the common law doctrine can not apply.³ It is believed, also, that it never existed in Ohio.⁴ So, in Connecticut, a conveyance by tenant for life, of an estate in fee simple, does not operate as a forfeiture of the life estate, nor affect persons seized of ulterior interests in the property, but simply passes such estate as the grantor had, and could lawfully convey, and is void as to the residue.⁵ In New Hampshire, it has been held, that a deed of release and quit claim in fee by tenant for life, is not a forfeiture of the estate for life.⁶ "At the common law, upon feudal reasons which never prevailed in this country," said the court, "if tenant for life made a forcible conveyance, which

¹ *McKee v. Pfout*, 3 Dall. 486; 1 Hilliard, R. P., 2d ed., p. 104, § 25. To the same effect is *rvine v. Sibbetts*, 26 Pa. St. (2 Casey), 477, 481.

² See so, *Sarah, &c.*, 5 Rawle, 113.

³ 4 Kent, 84. See *Pendleton v. Vandevier*, 1 Wash. 381, 388.

⁴ *Walker's Amer. Law*, 2d ed., 272.

⁵ *Rogers v. Moore*, 11 Conn. 553. See *Martin v. Sterling*, 1 Root, 210; *Lyman v. Hollister*, 12 Verm. 407.

⁶ *Bell v. Twilight*, 2 Post. 500.

divested the seizin, and turned the estate of him who had the inheritance into a right of entry, the estate of tenant for life was forfeited. But a grant or release never had that effect."¹

15. In New York, it was decided, prior to the adoption of the revised statutes, that an estate by the curtesy, if forfeited at all by an attempt to convey the fee, is only forfeited by feoffment with livery of seizin; and that the conveyance was by this mode, must be affirmatively shown to establish the forfeiture.² By the revised statutes, a conveyance by tenant for life of a greater estate than he possessed, or could lawfully convey, does not work a forfeiture, but passes the tenant's actual estate.³ In *Grout v. Townsend*,⁴ it was determined, that even before the revised statutes, a tenant for life did not forfeit his estate by leasing in fee; and since those statutes, no form of conveyance will work such forfeiture.

16. The Kentucky statute of 1798,⁵ provided, that "all alienations purporting to pass a greater estate than the alienor hath, shall operate to pass so much of the estate as he may lawfully convey, but shall not bar the residue of the right or estate, except, that if the alienation be with warranty by the alienor and his heirs, and any heritage descend from him to the demandant, then he shall be barred to the value of the heritage so descended."⁶ Some of the decided cases in that State, have affirmed the doctrine that dower, or other estate for life, is not forfeited by conveyance by bargain and sale, the courts holding, in conformity to the common law authorities, that such a conveyance passes nothing but what the grantor may lawfully convey.⁷ It has been further determined, that a forfeiture is not worked by the tenant's claiming or affirming a right to the fee, unless such claim be of record in a judicial proceeding; and that a deed though recorded, is mere matter *in pais*.⁸ A conveyance by a second husband, of dower lands assigned to the wife as the widow of a former husband, is not a

¹ And see N. H. Rev. Stat. 242-3; *Dennett v. Dennett*, 40 N. H. 498, 505.

² *Jackson v. Mancius*, 2 Wend 357; s. p. *Grout v. Townsend*, 2 Hill, 554.

³ 1 Rev. Stat. N. Y. p. 739, § 145.

⁴ *Grout v. Townsend*, 2 Hill, 554; affirmed in the court of appeals, 2 Denio, 336.

⁵ 1 Stat. Laws, 110; Rev. Stat. Ky. 1852, ch. 56, art. 1, § 1.

⁶ *Miller v. Shackleford*, 3 Dana, 289, 292.

⁷ *Smith v. Shackleford*, 9 Dana, 452, 475; *Robinson v. Miller*, 1 B. Mon. 88, 93; s. c. 2 B. Mon. 284, 292.

⁸ *Robinson v. Miller*, 1 B. Mon. 88, 94; s. c. 2 B. Mon. 284, 292.

discontinuance of her estate; and does not prejudice her right of entry, if she be the survivor.¹

17. It is also settled in Tennessee, that a conveyance in fee by a tenant for life, will have no other effect than to pass his actual interest in the estate.² "It is argued," said the court in *McCorry v. King*, "that the husband having only a life estate in the land of the wife, and having conveyed in fee, such a conveyance operated, like an ancient feoffment would at common law under like circumstances, to produce a disseizin of the wife, to make the title of the bargainee *eo instanti*, adverse to hers, to give to her an immediate right of entry, or at least to her heirs after her death; and that, therefore, the statute will bar the heirs at all events within seven years after her death. This court, however, on much consideration, held, in the case of *Miller v. Miller*, that such a consequence does not, at this day, and in this State, follow; that such a conveyance is valid to the extent of the interest of the bargainor; and that the wife and her heirs have no right accruing to them to sue till the termination of the particular estate, and may sue within seven years after such termination. We refer to that case, and consider it unnecessary here to repeat the grounds upon which the judgment of the court in that case was placed."

18. In North Carolina,³ Alabama,⁴ Michigan,⁵ Wisconsin,⁶ and Minnesota,⁷ statutes are in force embodying the general American doctrine, that a tenant for life does not, in any case, work a forfeiture, by conveying in form, a greater estate than he has.⁸

19. In dismissing this topic, it may be proper to add, that if there be, in any State, a forfeiture of the life estate by the act of the tenant for life, the party entitled to enter by reason of the forfeiture, is not bound to enter, but may wait until the natural termination of the life estate.⁹

Waste at common law.

20. By the ancient common law, the only persons punishable for

¹ *Smith v. White*, 1 B. Mon. 16; *Miller v. Shackelford*, 3 Dana, 289.

² *Miller v. Miller*, Meigs, 484; *McCorry v. King*, 3 Humph. 267.

³ N. C. Rev. Stat. 615; 1 Hilliard, R. P., 2d ed., p. 105, pl. 29.

⁴ Code Ala. 1852, § 1317.

⁵ 2 Mich. Comp. Stat. 1857, p. 838, § 4.

⁶ Wis. Rev. Stat. 1858, c. 86, § 4.

⁷ Minn. Stat. 1858, c. 35, § 4.

⁸ 1 Washb. R. P., 2d ed., 91, note.

⁹ 4 Kent, 84; *Wells v. Prince*, 9 Mass. 508; *Jackson v. Mancius*, 2 Wend. 357.

waste, were guardian in chivalry, tenant in dower, and tenant by the curtesy.¹ The liability did not extend to lessee for life, or for years. The reason of this distinction was, that in the tenancies first named, the estate was created by act of law, which properly furnished a remedy for the violation of the rights of the owner of the inheritance; but lessee for life, or for years, came in by the demise of the owner of the fee, who might have provided against the committing of waste. It was considered that the law was not bound to supply the omission of the lessor in this respect.² But by the statutes of Marlbridge,³ and Gloucester,⁴ it was provided, that the writ of waste should not only lie against tenants by the law of England (or curtesy) and those in dower, but also against any farmer or other, that held in any manner for life or years.⁵

21. The ancient remedies for waste were by writ of *estrepement* and the action of waste.⁶ These are now regarded as obsolete;⁷ and the modern practice is to resort to a bill in equity to enjoin the commission of waste when the injury would be irreparable, or by a special action on the case in the nature of waste, to recover damages.⁸

22. The punishment for waste was, by the common law and the statute of Marlbridge, only single damages.⁹ But the statute of Gloucester enacts, that the tenant shall lose and forfeit the place wherein the waste was committed, and also treble damages to him that hath the inheritance.¹⁰ The expression of the statute is, "he shall forfeit the *thing* which he hath wasted." It has been deter-

¹ It was doubted, however, whether waste was punishable at the common law in tenant by the curtesy. Bro. Abr. tit. Waste, 88; 2 Inst. 302; 2 Bl. Com. 283, note.

² 2 Inst. 299; 5 Co. 13; 2 Bl. Com. 283; 4 Kent, 78; 1 Washb. R. P., 2d ed., 108.

³ 52 Hen. III., c. 23; 2 Inst. 144, 145.

⁴ 6 Edw. I., c. 5; 2 Inst. 299.

⁵ 2 Bl. Com. 283. Mr. Reeves insists that the common law provided a remedy against waste by all tenants for life, and for years, and that the statute of Gloucester only made the remedy more specific and certain. 2 Reeves' Hist. Eng. Law, 73, 148.

⁶ Before the statute of Gloucester, if the heir was apprehensive that the dowress intended to commit waste, he might, before any waste done, have a prohibition directed to the sheriff, that he should not permit her to do waste. Co. Litt. 53 b.; 2 Inst. 299, 300, 145. And she was punishable by attachment thereupon, if after that she did waste. Fitzh. N. B. 55 (C); Park, Dow. 359. And she had a keeper set over her to guard against future waste. 2 Inst. 300.

⁷ The action of waste was abolished in England by the 3 & 4 Will. IV., ch. 27, § 36.

⁸ 4 Kent, 77, 78; 1 Bright, H. & W. 147-150; Park, Dow. 360.

⁹ 2 Inst. 146.

¹⁰ 2 Inst. 303.

mined, that under these words, the *place* is also included.¹ Blackstone, in commenting upon this provision, says:² "If waste be done *sparsim*, or here and there, all over a wood, the whole wood shall be recovered; or if in several rooms of a house, the whole house shall be forfeited;³ because it is impracticable for the reversioner to enjoy only the identical places wasted, when lying interspersed with the other. But if waste be done only in one end of a wood, (or perhaps in one room of a house, if that can be conveniently separated from the rest,) that part only is the *locus vastatus*, or thing wasted, and that only shall be forfeited to the reversioner."⁴

23. In general terms, waste may be defined to be, a spoiling or destroying of the estate with respect to buildings, wood, or soil, to the lasting injury of the inheritance. But no damage resulting from the act of God, as lightning, or tempest; or from public enemies, as an invading army; or from the reversioner himself, is waste. There are two kinds of waste, *voluntary* and *permissive*. Voluntary waste is that which results from actual commission, as felling timber, defacing buildings, opening mines, and changing the course of husbandry. Permissive waste is that which results from omission, as suffering buildings or other improvements to go to decay.⁵

24. It seems that a dowress is punishable, not only for voluntary, but also for permissive waste, although the English books do not furnish any express authority to that effect.⁶ But the statute of Anne,⁷ which exempts all persons from actions for accidental fire, except in the case of special agreements between landlord and tenant, is supposed to extend to tenants in dower.⁸ But it does not apply where the fire is the result of carelessness on the part of the tenant.⁹ It is laid down with respect to permissive waste, that there is no remedy after the death of the tenant.¹⁰

¹ 2 Inst. 303. ² 2 Bl. Com. 283. ³ Co. Litt. 54 a. ⁴ 2 Inst. 304; post, § 44.

⁵ Walker's Amer. Law, 2d ed., 272; 2 Bl. Com. 281; 4 Kent, 76; 1 Washb. R. P., 2d ed., 107, *et seq.*

⁶ Park, Dow. 357; 1 Bright, H. & W. 149, pl. 22; Hargr. Co. Litt. 57 a., note (1). See post, § 48.

⁷ 6 Anne, ch. 31, §§ 6, 7. The provisions of this Act were extended by 14 Geo. III., ch. 78.

⁸ Park, Dow. 357; 1 Bright, H. & W. 150, pl. 25. See Hargr. Co. Litt. 57 a., note (1); post, § 48.

⁹ Filliter v. Phippard, 17 Law J., N. S., Q. B. 89; 12 Jur. 202; 11 Q. B. 347. See Viscount Canterbury v. Atto.-Gen., 1 Ph. 306.

¹⁰ Turner v. Buck, 22 Vin. Abr. 523, pl. 9; Castlemain v. Craven, Ibid. pl. 11; Lansdowne v. Lansdowne, 1 Jac. & Walk. 522; 1 Bright, H. & W. 149, pl. 21.

25. If the tenant in dower cut down timber trees, they are the property of the heir or reversioner, and he may take them;¹ but if a house fall down *per vim venti*, in the time of tenant in dower, she has a special property in the timber to rebuild the like house for her habitation; and if she fell a tree for the purpose of repairs, she has a special property in it to that purpose; but she can not give or sell the tree so felled.² So, if she dig unopened mines, it will be waste; but she may work mines or coal pits which were opened in her husband's lifetime.³

26. If the dowress enter into a second marriage, and her husband commit waste and die, she is not punishable for this.⁴ But she shall answer for waste done by a stranger, for he in the reversion can not have any remedy but against the tenant, and the tenant has remedy over against the wrong-doer, and shall recover all in damages against him, and by this means the loss shall light upon the wrong-doer.⁵

27. At common law, if the heir granted over the reversion, his assignee had no remedy for waste done by the tenant in dower, but this was remedied by the statute of Gloucester.⁶ And in respect of the privity between the heir and the tenant in dower, the heir shall bring his action of waste against her notwithstanding she grants over her estate, and as well for waste committed by her as by her grantee; and he shall recover the place wasted against the assignee in that action, and damages against the tenant in dower, who shall take her remedy over.⁷ But as tenant in dower can hold of none but the heir and his heirs by descent, the assignee of the heir shall not have his action of waste against the tenant in dower

¹ 4 Co. 62 b.; Park, Dow. 357.

² 11 Co. 82; Cro. Eliz. 784; 5 Co. 13 b. See 2 P. Wms. 242.

³ Gilb. Dow. 391; 1 Taunt. 411. See vol. i., ch. x., § 10.

⁴ 15 Hen. III.; Fitzh. Waste, 133. But *contra* said to be held in *Atkins v. Glover*, MS. note by Serjeant Hill, in 22 Vin. Abr. 446, Linc. Inn Library. Park, Dow. 358, note.

⁵ 2 Inst. 303. ⁶ 2 Inst. 301; 11 Co. 83 b.; Co. Litt. 316 a., 53 b.; 3 Co. 23 b.

⁷ Fitz. N. B. 55 (E); 12 Hen. IV., 14; 30 Edw. III., 16 b.; 38 Edw. III., 23; 2 Inst. 301; 3 Co. 23 b.; 9 Co. 142 a.; Anon. Brownl. 239; Bro. Waste, pl. 76. "And the reason wherefore at common law the action of waste did lie against the tenant in dower, or tenant by the curtesy, albeit they had assigned over their estates, was, because no action of waste by the common law lay against the assignee for waste done after the assignment; therefore the action of necessity did for such waste (after the assignment), lie against the tenant by the curtesy, or tenant in dower, which law continues to this day." 2 Inst. 300.

who has granted over her estate, but against her assignee, for by the grant of the reversion the privity is destroyed.¹ But if the feoffee of the husband endow the wife, and she assign over her estate, waste lies for him against her; for (says the book), the plaintiff shall not suppose in his writ that she held in dower of him *ex assignatione*, but only that she held in dower of his heritage.²

28. If tenant in dower lease for her life to him in reversion within age, who never takes the profits, but at full age disagrees to the lease, he may have an action of waste for waste committed in the meantime.³

29. It was formerly doubted in England, whether the assets of one who had committed waste were liable after his death, on the ground that waste was a tort, the remedy for which died with the person. But by 3 & 4 Will. IV., ch. 42, § 2, an action of trespass, or trespass on the case, may be brought against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another in respect of his property, provided that the injury has been committed within six calendar months before such person's death, and the action be brought within six calendar months after the executors or administrators have undertaken the administration of the estate.⁴

30. Where property is gained by a wrongful act, the party injured may waive the tort, and have recourse to the action of assumpsit,⁵ which survives against the executors; an action will therefore lie against the executors of a tenant for life for the produce of waste committed; and as the demand is recoverable out of assets, it seems, as Mr. Jacob observes,⁶ that a bill in equity will lie for the same purpose.⁷ "This," he proceeds, "has been sometimes questioned, it being said that satisfaction for waste committed is to be decreed in equity only where an injunction is prayed for,

¹ Co. Litt. 54 a.; 316 a.; 2 Inst. 301; 3 Co. 23 b.; Fitzh. N. B. 56 (E, F). See post, § 49.

² Fitzh. N. B. 56 (E) n. (c). See, also, Fitzh. N. B. 55 (E) n. (a), and Dyer, 206 b.; Park, Dow. 359-60.

³ 30 Edw. III. 16; Fitzh. N. B. 55 (E) n. (a); Park, Dow. 360.

⁴ 1 Bright, H. & W. 148, pl. 18.

⁵ Hambly v. Trott, Cowp. 371. See Lightly v. Clouston, 1 Taunt. 112; Foster v. Stewart, 3 M. & S. 191.

⁶ 1 Roper, H. & W. by Jacob, 421.

⁷ Bishop of Winchester v. Knight, 1 P. Wms. 406. See Garth v. Cotton, 3 Atk. 751; 1 Ves. Sen. 524, 546; 1 Dick. 183.

upon the principle, that as courts of equity entertain jurisdiction to prevent the commission of further waste, they may, to prevent multiplicity of suits, at the same time give a remedy for the waste which has been committed.¹ It seems, however, to be a question open to much doubt whether this be the only principle of the jurisdiction;² if it be, it will follow that the account can not be decreed against the party who has committed the waste, unless one of the objects of the suit be an injunction; and, therefore, after the determination of his estate, the only remedy against him will be by action.³ But the objection that the demand is of a legal nature will not, as it seems, apply after his death, to a bill in equity to affect his assets."

Waste in the United States.

31. The American doctrine on the subject of waste is somewhat varied from the English law, and is more enlarged, and better accommodated to the circumstances of a new and growing country.⁴ But in many of the States, the provision in the statute of Gloucester, forfeiting the place wasted, has been substantially re-enacted.

32. It is said by Mr. Dane, that the statute of Gloucester was adopted in Massachusetts, as part of their common law, as to the remedial part only, but not as to the forfeiture or treble damages.⁵ On the other hand, Mr. Jackson, in his treatise on Real Actions,⁶ considers the common law of Massachusetts to be, that the plaintiff will generally, in the action of waste, recover the place wasted and treble damages. Chief Justice Parsons, in *Carver v. Miller*,⁷ intimated an opinion that tenant in dower is liable to forfeit for waste, the place wasted and treble damages. The supreme court decided, in *Padelford v. Padelford*,⁸ the question of the forfeiture for waste on estates in dower, in accordance with the opinion of Mr. Dane. But afterwards, in *Sackett v. Sackett*,⁹ the question was much more elaborately discussed; and the conclusion was, that the rule prescribed by the statute of Gloucester was brought over by the colo-

¹ 3 Atk. 262; 6 Ves. Jr. 89; 9 Ves. Jr. 346.

² See *Whitfield v. Bewit*, 2 P. Wms. 240; *Lee v. Alston*, 1 Bro. C. C. 194; 3 Bro. C. C. 37; 1 Ves. Jr. 78; *Hony v. Hony*, 1 S. & St. 568.

³ As in *Jesus College v. Bloome*, 3 Atk. 262; *Ambl. 54*. See 3 Atk. 381.

⁴ 4 Kent, 76. See vol. i., ch. x., §§ 21-24.

⁵ 3 Dane, Abr. c. 78, art. 11, § 2; art. 13, §§ 3-5; art. 14, § 2.

⁶ Jackson, Real Act. 340.

⁷ *Carver v. Miller*, 4 Mass. 559.

⁸ *Padelford v. Padelford*, 7 Pick. 152.

⁹ *Sackett v. Sackett*, 8 Pick. 309.

nists, when they first emigrated, as part of the common law.¹ The statute of 1783, gave the forfeiture of the place wasted, and single damages, against the tenant in dower. By the statute now in force, if the tenant in dower commit or suffer waste, the person having the next immediate estate of inheritance may recover the place wasted and the amount of damages done to the premises, in an action of waste.²

33. It was decided in Maine, in the case of *Smith v. Follansbee*,³ that the statute of Gloucester, so far as it affected tenants in dower, never formed a part of the common law of that State; and that an action of waste could not be maintained against the dowress. It was suggested, however, that an action on the case in the nature of waste, to recover the damages sustained by actual waste, might be supported; but whether the tenant in dower was liable for permissive waste,⁴ was left undetermined. A similar decision has been made in Georgia.⁵ But now, by statute in Maine, if tenant in dower commit or suffer waste, she forfeits the place wasted, and is liable for the damages done to the premises.⁶

34. In the following States, also, a dowress who is guilty of waste, forfeits the place wasted: New York,⁷ New Jersey,⁸ North Carolina,⁹ Delaware,¹⁰ Minnesota,¹¹ Missouri,¹² Kentucky,¹³ Rhode Island,¹⁴ Illinois,¹⁵ and Ohio.¹⁶ In Minnesota,¹⁷ judgment for forfei-

¹ 4 Kent, 80, note; 1 Washb. R. P., 2d ed., p. 121, pl. 54.

² Gen. Stat. Mass. p. 470, § 14; p. 708, § 1.

³ *Smith v. Follansbee*, 13 Me. 273. See *Hasty v. Wheeler*, 12 Me. 438.

⁴ See ante, §§ 23, 24.

⁵ *Parker v. Chambliss*, 12 Geo. 235.

⁶ Rev. Stat. Maine, 1857, p. 583, §§ 1-3; p. 606, § 15. The reversioner may have an action of waste to recover the place wasted, and the damages; or he may have an action on the case in the nature of waste to recover his damages only; but he can not have both. *Stetson v. Day*, 51 Me. 434. Taking fuel necessary for her own use, by the widow, and materials for the repair of buildings, and for fences on the part assigned her, from any woodland of which she is endowed, is not waste. Rev. Stat. 1857, p. 606, § 15.

⁷ 2 Rev. Stat. N. Y. p. 334, § 1; p. 335, § 10.

⁸ *Nixon's Dig.* p. 868, § 3. A court of equity will grant an injunction to prevent waste by the dowress. *Brundage v. Goodfellow*, 4 Halst. Ch. 513.

⁹ Rev. Code, N. C. 1855, p. 598, § 3. ¹⁰ Del. Code, 1852, p. 293, §§ 1, 9.

¹¹ Stat. Minn. 1858, p. 597, § 16.

¹² 2 Misso. Rev. Stat. 1855, ch. 94, § 42.

¹³ 2 Rev. Stat. Ky. by Stanton, p. 98, § 1. See *Robinson v. Miller*, 2 B. Mon. 284, 292.

¹⁴ Rev. Stat. R. I. 1857, ch. 204, § 1; ch. 202, § 20.

¹⁵ 1 Stat. Ill. 1858, p. 156, § 30. For negligent or inadvertent waste, the widow is liable in damages. *Ibid.*

¹⁶ 1 Rev. Stat. Ohio, p. 521, § 15.

¹⁷ Stat. Minn. 1858, ch. 64, § 17; ch. 36, § 22.

ture and eviction will only be rendered where the injury to the reversion is adjudged in the action to be equal to the value of the tenant's estate, or to have been done in malice. So in Indiana.¹ In Iowa,² the reversioner recovers a judgment of forfeiture and eviction, if the damages exceed two-thirds of the tenant's interest. In New Hampshire,³ Vermont,⁴ Mississippi,⁵ South Carolina,⁶ Michigan,⁷ Maryland,⁸ Virginia,⁹ Wisconsin,¹⁰ and Oregon,¹¹ tenants in dower are made liable in damages for waste, but there is no provision for forfeiture.¹² In Connecticut, on neglect of the widow to keep the premises assigned for her dower in good repair, the heir, or person entitled thereto at her decease, may make complaint to the county court of the county, or to the court of probate in the district in which the lands lie, who shall order so much of the houses and lands to be delivered to the next heir or person owning the same, for so long a term as in the judgment of the court may be necessary in order to repair such defects out of the rents and profits, unless the widow will give good security that she will leave the premises in sufficient repair.¹³

35. Although, as has been before observed, the rigor of the English rule in regard to waste, has been greatly modified in this country, it is nevertheless enforced in some of the States with considerable strictness. Thus, in Massachusetts, Maine, and New Hampshire, a widow is not permitted to be endowed of wild land, because, according to the law as administered in those States, it would be waste on the part of the tenant to clear the land and fit it for cultivation.¹⁴ But in a number of the States a more liberal rule prevails, and dower may not only be had in wild land, but the dow-

¹ 2 Rev. Stat. Ind. 1852, p. 174, § 627. ² Revision Iowa, 1860, p. 659, § 3717.

³ Comp. Stat. N. H. 1853, p. 420, § 7. The consumption by the widow of necessary fuel taken from the dower lands, "at her residence, when she shall not reside on her dower, shall not be deemed waste." Ibid. A different rule formerly prevailed. *Fuller v. Wason*, 7 N. H. 341. See *Chase v. Hazelton*, 7 N. H. 175.

⁴ Gen. Stat. Verm. 1863, c. 55, § 13. ⁵ Missis. Rev. Code, 1857, p. 469, art. 171.

⁶ 2 Brev. Dig. 331. ⁷ 2 Mich. Comp. L. 1857, ch. 89, § 22; ch. 136, §§ 1, 6.

⁸ 1 Md. Code, p. 683, § 290.

⁹ Code Va. 1849, p. 566, §§ 1, 4. The statute of Dec. 26, 1792, imposed a forfeiture for waste. 1 R. C. ch. 117.

¹⁰ Rev. Stat. Wis. 1858, p. 548, § 22; p. 855, §§ 1, 2, 4, 6.

¹¹ Stat. Oregon, 1855, p. 151, § 16.

¹² 1 Washb. R. P., 2d ed., 122, note.

¹³ Stat. Conn. 1854, p. 382, § 19. See *Beers v. Strong*, Kirby's Rep. 19.

¹⁴ Vol. i., ch. x., §§ 11-20.

ress may clear a portion of it for the purpose of cultivation.¹ In such case, however, she must leave wood and timber sufficient for the permanent use of the farm. And it is a question of fact, for a jury, what extent of wood may be cut down without exposing the party to the charge of waste.²

36. In Pennsylvania, in passing upon the right of the dowress to clear a proportion of woodland assigned her for dower, the court said: "There was a material difference between the local circumstances of this State and of Great Britain. It would be an outrage on common sense to suppose, that what would be deemed waste in England, could receive that appellation here. Lands in general with us are enhanced by being cleared, provided a proper proportion of woodland is preserved for the maintenance of the place. If the tenant in dower clears part of the lands assigned to her, and does not exceed the relative proportion of cleared land, considered as to the whole tract, she can not be said to have committed waste thereby."³ In a later case in the same State, the court observed upon this point as follows: "With regard to cutting and selling timber, the law has undoubtedly undergone some change from what it was at one time in England. It is not waste in Pennsylvania to turn arable land into meadow, nor *vice versa*; nor is it waste to clear land by a tenant for life. But there is a due and reasonable medium to be observed, according to the custom of farmers. To cut down all the timber on a tract of land and sell it, would be waste, because it would be injurious and detrimental to the inheritance. The question is not whether the land may be of equal value at the falling in of the life estate to what it was when it commenced. But it is whether the inheritance has been injured. Because a plantation now, although entirely stripped of its forest, might be of as much value as it was thirty years ago, when one-half of it was covered with timber; and yet, if one-third of the timber remained, it might, and probably would be now worth one-third more. This would depend upon the custom of farmers, the situation of the country, and the value of timber; and would be estimated by the jury from the evidence in the cause, under the instruction that the rule is, whether the inheritance has been injured or not."⁴

¹ Vol. i., ch. x., §§ 21-24; 4 Kent, 76; 1 Washb. R. P., 2d ed., pp. 111, 255. Jackson v. Brownson, 7 John. 227; Hickman v. Irvine, 3 Dana, 123; Keeler v. Eastman, 11 Verm. 293; Parkins v. Coxe, 2 Hayw. 339; Givens v. McCalmont, 4 Watts, 463.

² 4 Kent, 76.

³ Hastings v. Crunckleton, 3 Yeates, 261.

⁴ McCullough v. Irvine, 13 Pa. St. (1 Harris), 438, 443.

37. It is held, that the strict doctrine of the common law in regard to waste, never obtained in Ohio.¹ And where the dower assigned to a widow consisted of certain wholly unimproved unproductive town lots and a tract of unimproved woodland, it was decided, that she might sell timber growing on the woodland sufficient to raise the amount of money necessary to pay the taxes already due upon the lots and land, the taxes that had become a lien thereon, and to pay an agent's compensation for making the sales, paying the taxes and overseeing the premises to protect them from trespasses or other injury; and that such sale would not be waste. It was also held, that timber cut in improving the land belongs to the tenant for life, and not to the reversioner.²

38. In North Carolina, when a widow has dower assigned to her in a tract of land, the reversion of which is divided among several different reversioners, she has, in general, a discretionary right to get wood for repairs, fire-wood, &c., from what part of the land she pleases.³ But it seems, that in an extreme case, where the widow acts out of mere caprice and partiality, with a view to favor one at the expense of the others, a court of equity might be induced to interfere.⁴ And in the same State, waste has been defined to be, an unnecessary cutting down and disposing of timber, or destruction thereof, upon woodland, where there is already sufficient cleared land for the widow to cultivate, and over and above what is necessary to be used for fuel, fences, plantation utensils, and the like; but as it respects juniper swamp and other lands similarly circumstanced, where the making of timber into staves and shingles is the only use to be made of the land, then the widow shall not be liable to an action for using the timber according to the ordinary use made of the same in that part of the country.⁵ Upon the same subject, Johnston, J., in the case of *Ward v. Sheppard*,⁶ remarked: "It was decided, that waste in this country is not to be defined by the rules of the English law in all respects; for cutting timber trees for the purpose of clearing the lands, was not waste here, though it was so in England. If lands are leased to a lessee in an uncultivated state, he must of necessity have the power to clear,

¹ *Crockett v. Crockett*, 2 Ohio St. 180; *Allen v. McCoy*, 8 Ohio, 464.

² *Crockett v. Crockett*, 2 Ohio St. 180.

³ Post, § 46.

⁴ *Dalton v. Dalton*, 7 Ired. Eq. 197.

⁵ *Ballentine v. Poyner*, 2 Hayw. 110; *Martin & Hayw.* 268.

⁶ *Ward v. Sheppard*, 2 Hayw. 283; *Martin & Hayw.* 461.

otherwise the lease would be of no profit or advantage to him. The same is the case of dower lands. It is proved here, or attempted to be proved, that the cleared lands were not enough for her cultivation, and that the trees were cut down in contemplation of making a clearing. What shall be deemed waste, must, in a considerable degree, be in the discretion of the jury, upon evidence. It seems to me the evidence rather proves that the trees were cut down for sale. The jury will consider whether they were cut down for this purpose or not; and if they shall be of opinion that this was the design, then they should find her guilty of waste. If, on the contrary, the evidence proves that they were cut down with a view to clearing the land, they should find her not guilty."

39. In *Parkins v. Coxe*,¹ it was held to be waste to cut down timber for sale,² or to make tar out of lightwood on the land; but the court declared, that it was not waste to destroy timber in clearing the land for cultivation, or to cut it for the purpose of repairing buildings, fences, and plantation utensils; and that only is to be considered waste which is a substantial injury to the inheritance.³ But a widow has not the right to make turpentine upon the land assigned to her in dower, which, in the lifetime of her husband had not been used for that purpose. But she may rightfully use, in the ordinary mode of making turpentine, trees that have been boxed or tended for turpentine in his lifetime; and she may box new trees as those already boxed become unfit for use so as not to enlarge the crop beyond the extent produced before the dower was assigned.⁴

40. In *Lambeth v. Warner*,⁵ it was held, that a widow has a right to clear the lands assigned to her for dower, for the purpose of cultivation, where it is necessary for the enjoyment of the estate; provided it is done with a due regard to the proportion of wood and cleared land.⁶ The clearing of sixteen acres in addition to thirty acres already cleared in a tract of two hundred and forty acres heavily timbered, was considered not out of proportion or unreasonable, as regards the rights of the remainder-man.

¹ *Parkins v. Coxe*, 2 Hayw. 339; *Martin & Hayw.* 517.

² To the same effect, *Davis v. Gilliam*, 5 Ired. Eq. 308.

³ *Sheppard v. Sheppard*, 2 Hayw. 382; *Martin & Hayw.* 580.

⁴ *Carr v. Carr*, 4 Dev. & Bat. L. 179.

⁵ *Lambeth v. Warner*, 2 Jones' Eq. 165.

⁶ To the same effect, *Shine v. Wilcox*, 1 Dev. & Bat. Eq. 631; *Davis v. Gilliam*, 5 Ired. Eq. 308. See *Bright v. Wilson*, *Confer. Rep.* 24. The husband of a tenant in dower is not liable for mere permissive waste, after the death of his wife and the surrender of his possession. *Dozier v. Gregory*, 1 Jones, L. 100.

41. It is held in Tennessee, that a widow takes the dower estate with the rights and liabilities to which it is subject as a whole; and although she destroy all the timber on one of the lots included in her dower, yet if the whole dower estate be not injured thereby, it will not be waste. Nor is it waste for her to cut timber from the lands assigned her in dower, though it may not be necessary to her support, if she do not materially injure the inheritance, and leave sufficient for the permanent use of the estate so assigned. If the cleared land on the part assigned, be old and worn, and the proportion of woodland is such that a prudent farmer would consider it necessary to reduce a portion of it to cultivation, and so relieve the old land from excessive cultivation, such clearing would not be waste, provided sufficient timber for the permanent use of the dower estate were left.¹

42. In Kentucky, to remove timber prostrated by tempest, is not waste, where the timber is valueless.²

43. In Alabama, the rule is, that a tenant in dower has the right to change woodland into arable, if the proportion of woodland is such that a prudent farmer would consider it best to reduce a portion of it to cultivation; and the general criterion by which to determine whether waste has been committed, is where lasting damage has been done to the inheritance, or its value depreciated. Such a tenant, however, has not the right, at pleasure, to cut down, or otherwise injure, the growing timber, although she is entitled to what is necessary for fire-wood and for the repairs of buildings and fences on the dower lands. And it is doubted whether she has the right, under any pretence, to destroy groves of timber, or trees planted for shade or ornament.³

44. In a case in Maryland, commissioners appointed to make partition, divided an estate into eight parts, and assigned a third of each division to the widow. One of the lots was unimproved; the others were arable lands. It was held, that the widow was not bound to use each parcel as if her husband had died seized only of the one lot to which such parcel belonged; but might take from the woodlot, fuel and timber for the use of the cultivated lands.⁴

45. The following points were decided in Rhode Island: Converting meadow-land into pasture-land is not waste, unless the change

¹ Owen v. Hyde, 6 Yerg. 334.

² Houghton v. Cooper, 6 B. Mon. 281, 283.

³ Alexander v. Fisher, 7 Ala. 514.

⁴ Childs v. Smith, 1 Md. Ch. Dec. 483.

is detrimental to the inheritance, or contrary to the ordinary course of good husbandry. Suffering pastures to be overgrown with brush is waste in cases where it would not be permitted by a man of ordinary prudence. Cutting and selling wood off the farm is waste; but the reversioner can not claim a forfeiture on this account, if he has assented to it either before or after the cutting. Cutting hoop-poles is waste unless it is the ordinary mode of managing the farm. If the tenant receive a house in such a state that it is not reparable, he is not bound to repair it; but it is waste if he tear down such a house, and he is responsible even if the house is torn down after he has left the premises and without his consent. The removal of a building built by the tenant and not affixed to the freehold, is not waste. Nor is it waste to tear down a barn so dilapidated that there is danger it will fall upon the cattle.¹

46. It has been held in Massachusetts, that to cut oak trees for fire-wood, is not waste. Nor is it waste in a tenant in dower to cut timber on one parcel of land to make repairs on another, notwithstanding the reversion of the two parcels may be in different persons.² It is waste, however, to cut timber trees and sell them in exchange for fire-wood. But waste by cutting two trees in a wood-lot does not operate as a forfeiture of the whole land.³

47. In this country, as in England, it is waste in a dowress to open and work unopened mines in the lands assigned for dower.⁴ But if the mines have been opened in the husband's lifetime, she may continue to work them after his death, and receive and enjoy the products.⁵ She is entitled, also, to penetrate new seams, to sink new shafts,⁶ and to cut fuel and timber for use in mining.⁷ The fact that the husband had abandoned the mines in his lifetime, will make no difference in respect to the widow's right to work them after his death, if they are included in the assignment of her dower.⁸

¹ *Clemence v. Steere*, 1 R. Is. 272.

² *Ante*, § 38.

³ *Padelford v. Padelford*, 7 Pick. 152; *ante*, § 22.

⁴ Vol. i., ch. x., §§ 4-10.

⁵ *Coates v. Cheever*, 1 Cow. 460; *Billings v. Taylor*, 10 Pick. 460; *Moore v. Rollins*, 45 Maine, 493; *Findlay v. Smith*, 6 Munf. 134; *Crouch v. Puryear*, 1 Rand. 258; *Rockwell v. Morgan*, 2 Beasl. Ch. (N. J.) 384, 389; *Neel v. Neel*, 19 Pa. St. R. 323; *Irwin v. Covode*, 24 Pa. St. R. 162.

⁶ *Findlay v. Smith*, 6 Munf. 134; *Crouch v. Puryear*, 1 Rand. 258; vol. i., ch. x., § 9.

⁷ *Neel v. Neel*, 19 Pa. St. 323; *Findlay v. Smith*, 6 Munf. 134.

⁸ *Coates v. Cheever*, 1 Cow. 460; vol. i., ch. x., § 10.

48. The English statute relieving the tenant from liability on account of loss arising from accidental fires,¹ has not been re-enacted to any considerable extent in the United States.² Upon this subject, Chancellor Kent remarks: "There does not appear to have been any question raised and judicially decided in this country, respecting the tenant's responsibility for accidental fires, as coming under the head of this species of waste. I am not aware that the statute of Anne has, except in one instance, been formally adopted in any of the States. It was intimated upon the argument in the case of *White v. Wagner*,³ that the question had not been decided; and conflicting suggestions were made by counsel. Perhaps the universal silence in our courts upon the subject of any such responsibility of the tenant for accidental fires, is presumptive evidence that the doctrine of permissive waste has never been introduced and carried to that extent in the common law jurisprudence of the United States."⁴ It has been held in New York, that the statute of Anne, as modified by the 14 Geo. III., ch. 78, has become a part of the common law of that State;⁵ and in Delaware⁶ and New Jersey,⁷ it has been expressly adopted.

49. It is held in Massachusetts, in accordance with the doctrine of the common law,⁸ that after a tenant in dower has assigned her estate, she is not liable to the assignee of the reversion for waste committed by her assignee, either in an action of waste or in an action on the case in the nature of waste. And in an action by the assignee of the reversion against a tenant in dower for waste committed by her assignee, actual possession by the latter is sufficient evidence of the assignment to him, although the deed of assignment be not recorded until after the action is commenced.⁹ The court, however, in the case cited, recognize the principle, that if a tenant in dower assign her estate to a third person, who com-

¹ Ante, § 24.

² 4 Kent, 82.

³ *White v. Wagner*, 4 Harr. & John. 381-5.

⁴ See ante, § 24.

⁵ *Lansing v. Stone*, 37 Barb. 15. But see the remarks of Denio, J., in *Althorff v. Wolfe*, 22 N. Y. 366.

⁶ Rev. Stat. Del. 1852, ch. 88, § 6.

⁷ *Nixon's Dig.*, p. 868, § 8. The statute was adopted in this State in 1795. *Elmer's Dig.* 563. See, also, *Smith, Land. & Ten.*, Amer. ed. 199, note; 1 *Greenl. Cruise*, 133, note; 1 *Washb. R. P.*, 2d ed., 117; *Barnard v. Poor*, 21 Pick. 378; *Maull v. Wilson*, 2 *Harring.* 443; *Clark v. Foot*, 8 *John.* 329.

⁸ Ante, § 27.

⁹ *Foot v. Dickinson*, 2 *Met.* 611. See also, *Bates v. Shraeder*, 13 *John.* 260.

mits waste, the heir of the reversioner may maintain an action against her for such waste, on account of the privity between them. And we have seen that the rule, as established in the English courts, permits the assignee of the heir to enforce the same liability against the assignee of the life estate.¹ By statute in several of the States, if the tenant let or grant her estate and retain possession and commit waste, the party entitled to the reversion may maintain his action therefor against her.²

Non-payment of taxes.

50. In Ohio, it is provided by statute, that if the widow neglect to pay the taxes assessed upon the lands assigned for her dower, and suffer them to be sold for the payment of the taxes, and do not, within one year after such sale, redeem the same according to law, she shall forfeit her estate to the person next entitled to the reversion or remainder.³ So, in Maine, it is waste for the tenant to neglect to pay the taxes assessed upon the estate during the tenancy, and thereby subject it to sale. And in such case, the reversioner may have an action of waste to recover the premises, and the damages; or he may have an action on the case in the nature of waste to recover his damages only.⁴ If the tenant deem the taxes illegal, notice of that should be given to the reversioner, and he be indemnified against loss, if payment of the tax is to be resisted. In an action against the tenant, she can not deny the validity of the sale for taxes, because under the statute of Maine, the reversioner can not do so until he has paid or tendered the full amount of the tax, charges and interest, for which the sale was made.⁵

51. It was held, in a case in Ohio, that a sale for taxes during

¹ Ante, § 26; 1 Washb. R. P., 2d ed., 119.

² 2 Rev. Stat. N. Y., p. 334, § 2; Code Va. 1849, p. 566, § 1; 2 Rev. Stat. Ky. by Stanton, p. 98, § 4; Del. Code, 1852, p. 293, § 2; Nixon's Dig., p. 868, § 7; Rev. Stat. Wis. 1858, p. 855, § 2; 2 Comp. Laws Mich., p. 1258, § 2. For a full discussion of the subject of waste, the reader is referred to 1 Washb. R. P., ch. 5, § 4; 1 Hilliard, R. P., ch. 18; 4 Kent, 76-82; 1 Greenl. Cruise, tit. 3, ch. 2.

³ 2 Rev. Stat. Ohio, 1464, § 76. See McMillan v. Robbins, 5 Ohio, 28.

⁴ Stetson v. Day, 51 Maine, 434; Varney v. Stevens, 22 Maine, 331. But he can not have both actions. Stetson v. Day, *supra*. See 1 Greenl. Cruise, tit. 3, ch. 2, §§ 27, 28, 41; 4 Kent, 74.

⁵ Stetson v. Day, 51 Maine, 434.

the lifetime of the husband, extinguishes the right of dower.¹ In Illinois, in the case of *Finch v. Brown*,² which was an application by a widow to redeem a tract of land in which she claimed a dower interest, and which had been sold in her husband's lifetime, the court, in speaking of her right of dower, said: "Whether this right was defeated by the sale for taxes, is an important question, which we do not feel at liberty now to discuss or decide. It will more appropriately arise when she applies to have her dower assigned under the statute." Upon which Mr. Blackwell remarks:³ "This may be an important question, but it is easily answered under the statute of Illinois.⁴ 'No act, deed, or conveyance, performed or executed by the husband, without the assent of his wife, evinced by the acknowledgment thereof in the manner required by law, shall pass the estate of a married woman; and no judgment or decree confessed or recovered against him, and no *laches*, default, covin, forfeiture, or crime of the husband, shall prejudice the right of his wife to her dower or jointure, or preclude her from the recovery thereof, if otherwise entitled thereto.' This statute is based upon the principle, that inasmuch as the coverture of the wife makes her dependent upon her husband for the means necessary to protect her own interests, that no neglect of the husband to furnish those means shall, in any manner, affect her rights of property. Under these circumstances, it would be very extraordinary to hold, that the widow could not redeem, because she had no vested interest at the time of the sale, and then decide that her right of dower was divested by the tax sale on account of the *laches* of her husband, in not paying the tax, and thus protect her right in the premises."⁵

52. It has been held in North Carolina, that a widow who, after the death of her husband, occupies his residence, his children, some of whom are of age, living with her, is under no obligation to pay the taxes accruing thereon between his death and the assignment of her dower. Therefore, a purchase by her of the premises, for such taxes, made after the assignment of dower, without actual fraud, will not be set aside in favor of her husband's creditors.⁶

¹ *Jones v. Devore*, 8 Ohio St. 430. To the same effect is the opinion of Hall, J., in *Branson v. Yancy*, 1 Dev. Eq. 77, 82.

² *Finch v. Brown*, 3 Gilman, 488.

³ Blackwell, *Tax Titles*, 2d ed. 549.

⁴ Rev. Stat. 1845, p. 200, § 14.

⁵ It is well settled, that the neglect of the husband to assert his title to lands, and in permitting the statute of limitations to run against it, will not prejudice the rights of the wife. Ante, ch. xx., § 28.

⁶ *Branson v. Yancy*, 1 Dev. Eq. 77.

APPENDIX.

A.

A table, arranged by Chancellor Bland, showing the expectation of life according to various tables prepared in England and in the United States. 3 Bland's Ch. Rep. pp. 238, 239. See ante, ch. xxiv., §§ 13-17, 24.

Age.	London.	North-ampton.	Carlisle.	Equitable	SWEDISH.		FINLAIION'S.		PHILADELPHIA.		Age.
					Males.	Females.	Males.	Females.	Church.	Board of Health.	
0	19.2	25.18	38.72		37.82	41.01	50.16	55.51			0
1	27.0	32.74	44.68		46.26	48.60	50.13	55.59	30.91	25.96	1
2	32.0	37.79	47.55		48.12	50.28	50.04	55.37	34.43	32.92	2
3	34.0	39.55	49.82		48.84	50.90	49.80	55.05	35.74	36.80	3
4	35.6	40.58	50.76		49.05	51.15	49.42	54.65	37.30	36.85	4
5	36.0	40.84	51.25		48.99	51.04	48.93	54.23	37.91	36.94	5
6	36.0	41.07	51.17		48.80	50.79	48.36	53.72	38.60	37.02	6
7	35.8	41.07	50.80		48.60	50.38	47.71	53.15	38.24	36.42	7
8	35.6	40.79	50.24		47.91	49.78	47.02	52.50	37.80	35.85	8
9	35.2	40.36	49.57		47.30	49.23	46.30	51.80	37.50	35.23	9
10	34.8	39.78	48.82	43.73	46.68	48.55	45.57	51.05	37.12	34.59	10
11	34.3	39.14	48.04	43.06	45.95	47.83	44.83	50.27	36.74	33.95	11
12	33.7	38.49	47.27	42.39	45.21	47.09	44.07	49.48	36.09	33.20	12
13	33.1	37.83	46.51	41.71	44.59	46.00	43.31	48.70	35.43	32.44	13
14	32.5	37.17	45.75	41.03	43.87	45.51	42.53	47.93	34.77	31.68	14
15	31.9	36.51	45.00	40.35	42.88	44.72	41.75	47.19	34.10	30.92	15
16	31.3	35.85	44.27	39.68	42.11	43.95	41.01	46.51	33.43	30.16	16
17	30.7	35.20	43.57	39.01	41.34	43.18	40.29	45.86	32.73	29.38	17
18	30.1	34.58	42.87	38.34	40.57	42.73	39.61	45.22	32.02	28.60	18
19	29.5	33.99	42.17	37.68	39.79	41.62	38.98	44.60	31.31	27.82	19
20	28.9	33.43	41.46	37.05	39.05	40.90	38.39	43.99	30.60	27.04	20
21	28.3	32.90	40.75	36.45	38.32	40.05	37.83	43.36	29.88	26.25	21
22	27.7	32.39	40.04	35.88	37.61	39.16	37.34	42.73	29.40	24.57	22
23	27.2	31.88	39.31	35.32	36.91	38.66	36.87	42.09	28.93	25.19	23
24	26.6	31.36	38.59	34.78	36.19	37.91	36.89	41.45	28.46	24.67	24
25	26.1	30.85	37.86	34.24	35.48	37.17	35.90	40.81	27.99	24.14	25
26	25.6	30.33	37.14	33.70	34.75	36.43	35.41	40.17	27.50	23.61	26
27	25.1	29.82	36.41	33.16	34.68	35.69	34.86	39.52	27.00	23.08	27
28	24.6	29.30	35.69	32.62	33.30	34.96	34.31	38.87	26.50	22.55	28
29	24.1	28.79	35.00	32.07	32.57	34.22	33.75	38.22	25.99	22.01	29
30	23.6	28.27	34.34	31.52	31.85	33.49	33.17	37.57	25.50	21.48	30
31	23.1	27.76	33.60	30.97	31.12	32.77	32.59	36.91	24.99	20.93	31
32	22.7	27.24	33.03	30.40	30.39	32.04	32.00	36.26	24.59	20.65	32
33	22.3	26.72	32.36	29.84	29.66	31.33	31.40	35.61	24.19	20.40	33
34	21.9	26.20	31.68	29.26	29.07	30.61	30.79	34.96	23.80	20.16	34
35	21.5	25.68	31.00	28.66	28.20	29.90	30.17	34.31	23.40	19.95	35
36	21.1	25.16	30.32	28.07	27.48	29.19	29.54	33.68	23.01	19.76	36
37	20.7	24.64	29.64	27.47	26.75	28.48	28.91	33.04	22.64	19.57	37
38	20.3	24.12	28.96	26.86	26.03	27.77	28.28	32.04	22.23	19.40	38
39	19.9	23.60	28.28	26.26	25.32	27.26	27.65	31.76	21.83	19.25	39
40	19.6	23.08	27.61	25.65	24.62	26.35	27.02	31.12	21.44	19.15	40
41	19.2	22.56	26.97	25.04	23.93	25.65	26.39	30.46	21.05	19.09	41
42	18.8	22.04	26.34	24.42	23.24	24.97	25.74	29.81	20.80	18.87	42
43	18.5	21.54	25.71	23.80	22.56	24.47	25.08	29.14	20.22	18.54	43
44	18.1	21.03	25.09	23.18	21.87	23.61	24.42	28.48	19.82	18.18	44
45	17.8	20.52	24.46	22.55	21.18	22.92	23.75	27.81	19.42	17.91	45
46	17.4	20.02	23.82	21.92	20.51	22.21	23.07	27.13	18.99	17.64	46
47	17.0	19.51	23.17	21.29	19.84	21.49	22.38	26.44	18.55	17.44	47

A.—Continued.

Age.	London.	North-ampton.	Carlisle.	Equitable	SWEDISH.		FINLAISSON'S.		PHILADELPHIA.		Age.
					Males.	Females.	Males.	Females.	Church.	Board of Health.	
48	16.7	19.00	22.50	20.65	19.18	20.77	21.68	25.75	18.14	17.24	48
49	16.3	18.49	21.81	20.01	18.53	20.06	20.98	25.06	17.73	17.02	49
50	16.0	17.99	21.11	19.37	17.90	19.37	20.30	24.35	17.32	16.82	50
51	15.6	17.50	20.39	18.73	17.30	18.70	19.62	23.65	16.92	16.66	51
52	15.2	17.02	19.68	18.10	16.72	18.05	18.97	22.93	16.52	16.31	52
53	14.9	16.54	18.97	17.48	16.14	17.39	18.34	22.22	16.13	15.97	53
54	14.5	16.06	18.28	16.87	15.55	16.74	17.73	21.50	15.75	15.64	54
55	14.2	15.58	17.58	16.28	14.97	16.08	17.15	20.79	15.40	15.33	55
56	13.8	15.10	16.89	15.70	14.37	15.45	16.57	20.08	15.04	14.97	56
57	13.4	14.63	16.21	15.14	13.80	14.82	16.02	19.38	14.68	14.62	57
58	13.1	14.15	15.55	14.59	13.25	14.20	15.47	18.69	14.35	14.31	58
59	12.7	13.68	14.92	14.05	12.70	13.58	14.93	18.00	14.04	14.00	59
60	12.4	13.21	14.34	13.53	12.17	12.98	14.39	17.32	13.75	13.71	60
61	12.0	12.75	13.82	13.02	11.66	12.40	13.84	16.64	13.48	13.44	61
62	11.6	12.28	13.31	12.52	11.15	11.84	13.28	15.96	13.04	13.06	62
63	11.2	11.81	12.81	12.03	10.64	11.30	12.72	15.30	12.60	12.68	63
64	10.8	11.35	12.30	11.50	11.11	10.76	12.17	14.64	12.17	12.25	64
65	10.5	10.88	11.79	11.07	9.60	10.16	11.63	14.00	11.70	11.82	65
66	10.1	10.42	11.27	10.59	9.11	9.69	11.10	13.37	11.23	11.41	66
67	9.8	9.86	10.75	10.17	8.61	9.18	10.61	12.76	10.76	11.00	67
68	9.4	9.50	10.23	9.64	8.14	8.67	10.14	12.16	10.30	10.60	68
69	9.1	9.05	9.70	9.16	7.68	8.17	9.67	11.57	9.83	10.21	69
70	8.8	8.60	9.18	8.69	7.25	7.69	9.22	10.99	9.37	9.83	70
71	8.4	8.17	8.65	8.23	6.88	7.25	8.79	10.44	8.92	9.48	71
72	8.2	7.74	8.16	7.77	6.50	6.85	8.37	9.92	8.54	9.15	72
73	7.8	7.33	7.72	7.31	6.16	6.47	7.96	9.41	8.16	8.84	73
74	7.5	6.92	7.33	6.87	5.82	6.11	7.54	8.92	7.75	8.47	74
75	7.2	6.54	7.01	6.43	5.50	5.78	7.12	8.46	7.43	8.23	75
76	6.8	6.18	6.69	6.00	5.22	5.39	6.69	8.00	7.06	7.78	76
77	6.4	5.83	6.40	5.59	4.94	5.10	6.23	7.58	6.72	7.50	77
78	6.0	5.48	6.12	5.20	4.51	4.80	5.78	7.19	6.40	7.25	78
79	5.5	5.11	5.80	4.83	4.41	4.50	5.35	6.83	6.15	7.07	79
80	5.0	4.75	5.51	4.50	4.09	4.22	4.94	6.50	5.95	6.97	80
81		4.41	5.21	4.20	3.86	3.98	4.55	6.20	5.86	7.00	81
82		4.09	4.93	3.91	3.67	3.77	4.18	5.89	5.40	6.65	82
83		3.80	4.65	3.65	3.50	3.55	3.82	5.57	4.94	6.33	83
84		3.58	4.39	3.43	3.36	3.40	3.46	5.22	4.50	6.00	84
85		3.37	4.12	3.23	3.23	3.23	3.12	4.84	4.07	5.85	85
86		3.19	3.90	3.02	3.07	3.16	2.81	4.44	3.66	5.50	86
87		3.01	3.71	2.82	2.95	3.01	2.53	4.03	3.30	5.17	87
88		2.86	3.59	2.58	2.78	2.83	2.31	3.62	3.00	4.92	88
89		2.66	3.47	2.37	2.68	2.57	2.12	3.21	2.83	4.75	89
90		2.41	3.28	2.19	2.50	2.26	1.95	2.83		4.73	90
91		2.09	3.26	2.10	2.38	2.06	1.83	2.49			91
92		1.75	3.37	1.90	2.18	1.83	1.65	2.21			92
93		1.37	3.48	1.65	1.96	1.75	1.49	1.97			93
94		1.05	3.53	1.37	1.87	1.72	1.34	1.75			94
95		0.75	3.53	1.25	1.70	1.70	1.18	1.55			95
96		0.50	3.46	1.00	1.50	1.50	0.97	1.32			96
97			3.28	0.50	1.00	1.00	0.75	1.12			97
98			3.07				0.50	0.94			98
99			2.77					0.75			99
100			2.28					0.50			100
101			1.79								101
102			1.30								102
103			0.83								103

B.

Showing the Expectation of Life, deduced from Dr. Wigglesworth's Table of Mortality.
See ante, ch. xxiv., § 24.

Age.	Expectation.	Age.	Expectation.	Age.	Expectation.	Age.	Expectation.
YEARS.	YEARS.	YEARS.	YEARS.	YEARS.	YEARS.	YEARS.	YEARS.
0	28.15	24	32.70	48	22.27	72	9.14
1	36.78	25	32.33	49	21.72	73	8.69
2	38.74	26	31.93	50	21.17	74	8.25
3	40.01	27	31.50	51	20.61	75	7.83
4	40.73	28	31.08	52	20.05	76	7.40
5	40.88	29	30.66	53	19.49	77	6.99
6	40.69	30	30.25	54	18.92	78	6.59
7	40.47	31	29.83	55	18.35	79	6.21
8	40.14	32	29.43	56	17.78	80	5.85
9	39.72	33	29.02	57	17.20	81	5.50
10	39.23	34	28.62	58	16.63	82	5.16
11	38.64	35	28.22	59	16.04	83	4.87
12	38.02	36	27.78	60	15.45	84	4.66
13	37.41	37	27.34	61	14.86	85	4.57
14	36.79	38	26.91	62	14.26	86	4.21
15	36.17	39	26.47	63	13.66	87	3.90
16	35.76	40	26.04	64	13.05	88	3.67
17	35.37	41	25.61	65	12.43	89	3.56
18	34.98	42	25.19	66	11.96	90	3.73
19	34.59	43	24.77	67	11.48	91	3.32
20	34.22	44	24.35	68	11.01	92	3.12
21	33.84	45	23.92	69	10.50	93	2.40
22	33.46	46	23.37	70	10.06	94	1.98
23	33.08	47	22.83	71	9.60	95	1.62

C.

Annuity Table, showing the value of an Annuity of one dollar on a single life, according to the Carlisle Table of Mortality. See "A." of this Appendix for the Carlisle Table.

Age.	4 per cent.	5 per cent.	6 per cent.	7 per cent.	8 per cent.	9 per cent.	10 per cent.
1	16.554	13.995	12.078	10.605	9.439	8.502	7.732
2	17.726	14.983	12.925	11.342	10.088	9.080	8.251
3	18.715	15.824	13.652	11.978	10.651	9.584	8.705
4	19.231	16.271	14.042	12.322	10.957	9.858	8.954
5	19.592	16.590	14.325	12.574	11.184	10.064	9.141
6	19.745	16.735	14.460	12.698	11.298	10.168	9.237
7	19.790	16.790	14.518	12.756	11.354	10.221	9.287
8	19.764	16.786	14.526	12.770	11.371	10.240	9.306
9	19.691	16.742	14.500	12.754	11.362	10.236	9.304
10	19.583	16.669	14.448	12.717	11.334	10.214	9.286
11	19.458	16.581	14.384	12.669	11.296	10.183	9.261
12	19.334	16.494	14.321	12.621	11.259	10.153	9.238
13	19.209	16.406	14.257	12.572	11.221	10.123	9.213
14	19.081	16.316	14.191	12.522	11.182	10.091	9.187
15	18.995	16.227	14.126	12.473	11.144	10.061	9.161
16	18.836	16.144	14.067	12.429	11.111	10.034	9.140
17	18.721	16.066	14.012	12.389	11.081	10.011	9.122
18	18.606	15.987	13.956	12.348	11.051	9.988	9.104
19	18.486	15.904	13.897	12.305	11.019	9.963	9.085
20	18.361	15.817	13.835	12.259	10.985	9.937	9.064
21	18.231	15.726	13.769	12.210	10.948	9.909	9.041
22	18.093	15.628	13.697	12.156	10.906	9.876	9.015
23	17.950	15.525	13.621	12.098	10.861	9.841	8.987
24	17.800	15.417	13.541	12.037	10.813	9.802	8.955
25	17.644	15.303	13.456	11.972	10.762	9.761	8.921
26	17.485	15.187	13.368	11.904	10.709	9.718	8.886
27	17.320	15.065	13.275	11.832	10.652	9.671	8.847
28	17.154	14.942	13.182	11.759	10.594	9.624	8.808
29	16.996	14.827	13.096	11.693	10.542	9.583	8.773
30	16.852	14.723	13.020	11.636	10.498	9.548	8.747
31	16.705	14.617	12.942	11.578	10.454	9.514	8.719
32	16.552	14.506	12.860	11.516	10.407	9.476	8.690
33	16.390	14.387	12.771	11.448	10.355	9.435	8.657
34	16.219	14.260	12.675	11.374	10.297	9.389	8.619
35	16.041	14.127	12.573	11.295	10.235	9.339	8.578
36	15.855	13.987	12.465	11.211	10.168	9.285	8.534
37	15.665	13.843	12.354	11.124	10.098	9.228	8.488
38	15.471	13.695	12.239	11.033	10.026	9.169	8.439
39	15.271	13.542	12.120	10.939	9.950	9.107	8.388
40	15.073	13.390	12.002	10.845	9.875	9.046	8.337
41	14.883	13.245	11.890	10.757	9.805	8.991	8.292
42	14.694	13.101	11.779	10.671	9.737	8.937	8.249
43	14.505	12.957	11.668	10.585	9.669	8.883	8.206
44	14.308	12.806	11.551	10.494	9.597	8.826	8.160
45	14.104	12.648	11.428	10.397	9.520	8.764	8.111
46	13.889	12.480	11.296	10.292	9.436	8.697	8.056
47	13.662	12.301	11.154	10.178	9.344	8.622	7.995
48	13.419	12.107	10.998	10.052	9.241	8.537	7.925
49	13.153	11.892	10.823	9.908	9.121	8.437	7.840
50	12.869	11.660	10.631	9.749	8.987	8.324	7.744
51	12.565	11.410	10.422	9.573	8.838	8.197	7.634
52	12.257	11.154	10.208	9.392	8.684	8.064	7.519

C.—*Continued.*

Age.	4 per cent.	5 per cent.	6 per cent.	7 per cent.	8 per cent.	9 per cent.	10 per cent.
53	11.945	10.892	9.988	9.205	8.523	7.926	7.399
54	11.626	10.624	9.761	9.011	8.356	7.781	7.272
55	11.299	10.347	9.524	8.807	8.179	7.627	7.137
56	10.966	10.063	9.280	8.595	7.995	7.465	6.994
57	10.625	9.771	9.027	8.375	7.802	7.294	6.843
58	10.286	9.478	8.772	8.153	7.606	7.120	6.687
59	9.963	9.199	8.529	7.940	7.418	6.954	6.539
60	9.663	8.940	8.304	7.743	7.245	6.800	6.402
61	9.398	8.712	8.108	7.572	7.095	6.669	6.285
62	9.136	8.487	7.913	7.403	6.947	6.539	6.171
63	8.871	8.258	7.714	7.229	6.795	6.404	6.052
64	8.593	8.016	7.502	7.042	6.630	6.258	5.922
65	8.307	7.765	7.281	6.847	6.457	6.104	5.784
66	8.009	7.503	7.049	6.641	6.272	5.938	5.635
67	7.699	7.227	6.803	6.421	6.075	5.760	5.474
68	7.379	6.941	6.546	6.189	5.866	5.570	5.301
69	7.048	6.643	6.277	5.945	5.643	5.368	5.115
70	6.709	6.336	5.988	5.690	5.410	5.153	4.918
71	6.357	6.015	5.704	5.420	5.160	4.923	4.704
72	6.025	5.711	5.424	5.162	4.922	4.701	4.498
73	5.724	5.435	5.170	4.927	4.704	4.499	4.309
74	5.458	5.190	4.944	4.719	4.511	4.319	4.142
75	5.239	4.989	4.760	4.549	4.355	4.175	4.008
76	5.023	4.792	4.579	4.382	4.200	4.031	3.874
77	4.824	4.609	4.410	4.227	4.056	3.898	3.751
78	4.621	4.422	4.238	4.067	3.908	3.760	3.623
79	4.393	4.210	4.040	3.883	3.736	3.599	3.471
80	4.182	4.015	3.858	3.713	3.577	3.450	3.331
81	3.953	3.799	3.656	3.523	3.398	3.282	3.172
82	3.746	3.606	3.474	3.352	3.237	3.130	3.029
83	3.534	3.406	3.286	3.174	3.069	2.970	2.877
84	3.328	3.211	3.102	2.999	2.903	2.813	2.728
85	3.115	3.009	2.909	2.815	2.727	2.644	2.567
86	2.928	2.830	2.739	2.652	2.571	2.495	2.423
87	2.775	2.685	2.599	2.519	2.443	2.372	2.304
88	2.683	2.597	2.515	2.439	2.366	2.299	2.234
89	2.577	2.495	2.417	2.344	2.276	2.211	2.150
90	2.416	2.339	2.266	2.198	2.133	2.072	2.015
91	2.398	2.321	2.248	2.180	2.115	2.054	1.997
92	2.491	2.412	2.337	2.266	2.198	2.135	2.075
93	2.599	2.518	2.440	2.367	2.297	2.232	2.170
94	2.649	2.569	2.492	2.419	2.350	2.284	2.221
95	2.674	2.596	2.522	2.451	2.383	2.319	2.258
96	2.627	2.555	2.486	2.420	2.358	2.298	2.239
97	2.492	2.428	2.368	2.309	2.253	2.199	2.150
98	2.332	2.278	2.227	2.177	2.129	2.083	2.039
99	2.087	2.045	2.004	1.964	1.926	1.889	1.856
100	1.652	1.624	1.596	1.569	1.543	1.517	1.493

D.

Showing the Value of an Annuity on a Single Life, at every Age, deduced from the Tables of Dr. Wigglesworth.

Age.	5 per ct.	6 per ct.	Age	5 per ct.	6 per ct.	Age.	5 per ct.	6 per ct.	Age.	5 p. ct.	6 p. ct.
0	9.802	8.584	25	13.574	12.024	50	11.487	10.453	75	5.551	5.284
1	12.877	11.268	26	13.523	11.987	51	11.320	10.317	76	5.284	5.038
2	13.625	11.919	27	13.459	11.938	52	11.146	10.175	77	5.018	4.793
3	14.155	12.384	28	13.395	11.890	53	10.965	10.027	78	4.756	4.550
4	14.509	12.698	29	13.332	11.843	54	10.777	9.872	79	4.503	4.315
5	14.668	12.843	30	13.270	11.797	55	10.581	9.709	80	4.265	4.093
6	14.711	12.887	31	13.208	11.752	56	10.376	9.539	81	4.016	3.860
7	14.745	12.925	32	13.148	11.708	57	10.163	9.359	82	3.775	3.633
8	14.743	12.931	33	13.090	11.665	58	9.939	9.171	83	3.568	3.439
9	14.706	12.906	34	13.033	11.625	59	9.706	8.972	84	3.421	3.301
10	14.646	12.862	35	12.978	11.587	60	9.462	8.763	85	3.380	3.266
11	14.538	12.775	36	12.901	11.529	61	9.205	8.541	86	3.105	3.005
12	14.420	12.679	37	12.825	11.472	62	8.936	8.307	87	2.866	2.777
13	14.296	12.578	38	12.749	11.416	63	8.654	8.060	88	2.696	2.615
14	14.167	12.470	39	12.673	11.360	64	8.356	7.797	89	2.617	2.542
15	14.031	12.357	40	12.598	11.306	65	8.042	7.517	90	2.805	2.731
16	13.976	12.315	41	12.525	11.253	66	7.813	7.317	91	2.481	2.422
17	13.928	12.279	42	12.452	11.201	67	7.579	7.110	92	2.097	2.052
18	13.881	12.244	43	12.382	11.152	68	7.340	6.898	93	1.716	1.683
19	13.835	12.211	44	12.313	11.105	69	7.095	6.680	94	1.350	1.327
20	13.791	12.178	45	12.238	11.052	70	6.844	6.456	95	1.038	1.022
21	13.749	12.148	46	12.098	10.942	71	6.589	6.226	96	0.744	0.734
22	13.702	12.114	47	11.954	10.827	72	6.328	5.991	97	0.562	0.555
23	13.658	12.082	48	11.804	10.707	73	6.064	5.751	98	0.476	0.472
24	13.615	12.052	49	11.649	10.583	74	5.807	5.518	99	0.000	0.000

This table exhibits the value of an annuity on a single life at every age. Thus, a person at the age of 30 must pay \$13.27 to secure an annuity of one dollar per annum, interest being at 5 per cent. ; or \$11.80, interest being at 6 per cent.—*Amer. Almanac*, 1856, pp. 227, 229.

E.

A Table corresponding with the Northampton Table, (see "A." of this Appendix), showing the value of an annuity of one dollar, at six per cent., on a single life, at any age from one year to ninety-four, inclusive.

"The whole number, and part or parts of one annual payment of an annuity, which all the future payments are worth in present money, is called *the number of years' purchase* the annuity is worth, and, being the sum of the present values of all the future payments, is also the sum which, being put out and improved at compound interest, will just suffice for the payment of the annuity."—3 *Encycl. Brittan.* 8th ed., p. 233, tit. Annuities.

Age.	No. of years' purchase the annuity is worth.	Age.	No. of years' purchase the annuity is worth.	Age.	No. of years' purchase the annuity is worth.
1	10.107	33	11.423	65	6.841
2	11.724	34	11.331	66	6.625
3	12.348	35	11.236	67	6.405
4	12.769	36	11.137	68	6.179
5	12.962	37	11.035	69	5.949
6	13.156	38	10.929	70	5.716
7	13.275	39	10.819	71	5.479
8	13.337	40	10.705	72	5.241
9	13.335	41	10.589	73	4.781
10	13.285	42	10.473	74	4.565
11	13.212	43	10.356	75	4.354
12	13.130	44	10.235	76	4.154
13	13.044	45	10.110	77	3.952
14	12.953	46	9.980	78	3.742
15	12.857	47	9.846	79	3.514
16	12.755	48	9.707	80	3.281
17	12.655	49	9.563	81	3.155
18	12.562	50	9.417	82	2.926
19	12.477	51	9.273	83	2.713
20	12.398	52	9.129	84	2.551
21	12.329	53	8.980	85	2.402
22	12.265	54	8.827	86	2.266
23	12.200	55	8.670	87	2.138
24	12.132	56	8.509	88	2.031
25	12.063	57	8.343	89	1.882
26	11.992	58	8.173	90	1.689
27	11.917	59	7.999	91	1.422
28	11.841	60	7.820	92	1.136
29	11.763	61	7.637	93	0.806
30	11.682	62	7.449	94	0.518
31	11.598	63	7.253		
32	11.512	64	7.052		

RULE FOR COMPUTING THE VALUE OF THE LIFE ESTATE OR ANNUITY.

Calculate the interest at six per cent., for one year, upon the sum to the income of which the person is entitled; multiply this interest by the number of years' purchase set opposite the person's age in the table, and the product is the gross value of the life estate of such person in said sum.

EXAMPLE.

Suppose a widow's age is 37, and she is entitled to dower in real estate worth \$350.75; one-third of this is \$116.91 $\frac{2}{3}$; interest on \$116.91, one year, at six per cent., is \$7.01; the number of years' purchase which an annuity of one dollar is worth, at the age of 37, as appears by the table, is 11 years and 0.35.1000 parts of a year, which, multiplied by \$7.01, the income for one year, gives \$77.35 and a fraction, as the gross value of her right of dower.—*Dayton on Surrogates*, Appendix, lxvi.

F.

Showing the present value of a Life-Right in the income of \$100, at every age, calculating the interest at 5 and at 6 per cent., according to Dr. Wigglesworth's Table of Mortality.

Age.	Interest 5 per ct.	Interest 6 per ct.	Age.	Interest 5 per ct.	Interest 6 per ct.	Age.	Interest 5 per ct.	Interest 6 per ct.	Age.	Interest 5 per ct.	Int. 6 per ct.
0	49.01	51.50	24	68.08	72.31	48	59.02	64.24	72	31.64	35.95
1	64.39	67.61	25	67.87	72.14	49	58.25	63.50	73	30.32	34.51
2	68.13	71.51	26	67.62	71.92	50	57.44	62.72	74	29.04	33.11
3	70.78	74.30	27	67.30	71.63	51	56.60	61.90	75	27.76	31.70
4	72.55	76.19	28	66.98	71.34	52	55.73	61.05	76	26.42	30.23
5	73.34	77.06	29	66.66	71.06	53	54.83	60.16	77	25.09	28.76
6	73.56	77.32	30	66.35	70.78	54	53.89	59.23	78	23.78	27.30
7	73.73	77.55	31	66.04	70.51	55	52.91	58.25	79	22.52	25.89
8	73.72	77.59	32	65.74	70.25	56	51.88	57.23	80	21.33	24.56
9	73.53	77.44	33	65.45	69.99	57	50.82	56.15	81	20.08	23.16
10	73.23	77.17	34	65.17	69.75	58	49.70	55.03	82	18.88	21.80
11	72.69	76.65	35	64.89	69.52	59	48.53	53.83	83	17.84	20.43
12	72.10	76.07	36	64.51	69.17	60	47.31	52.58	84	17.11	19.81
13	71.48	75.47	37	64.13	68.83	61	46.03	51.25	85	16.90	19.60
14	70.84	74.82	38	63.75	68.50	62	44.68	49.84	86	15.53	18.03
15	70.16	74.14	39	63.37	68.16	63	43.27	48.36	87	14.33	16.66
16	69.88	73.89	40	62.99	67.84	64	41.78	46.78	88	13.48	15.69
17	69.64	73.67	41	62.63	67.52	65	40.21	45.10	89	13.09	15.25
18	69.41	73.46	42	62.26	67.21	66	39.07	43.90	90	14.03	16.39
19	69.18	73.27	43	61.91	66.91	67	37.90	42.66	91	12.41	14.53
20	68.96	73.07	44	61.57	66.63	68	36.70	41.39	92	10.49	12.31
21	68.75	72.89	45	61.19	66.31	69	35.48	40.08	93	8.58	10.10
22	68.51	72.68	46	60.49	65.65	70	34.22	38.74	94	6.75	7.96
23	68.29	72.49	47	59.77	64.96	71	32.95	37.36	95	5.19	6.13

This table exhibits the value of a life-right in the income of \$100, supposing the rate of interest to be five or six per cent. Thus, the value of the life-right of a person aged 50, interest being 6 per cent., is 62.72 per cent. Subtracting this from \$100, leaves the present value of the reversion 37.28 per cent. Hence, if the estate was worth \$10,000, the present value of the life-right would be \$6272, and the present value of the reversion \$3728.—*Amer. Almanac*, 1856, pp. 227-8.

G.

Showing the value of a Widow's Dower in the income of \$100, at every age, calculating the interest at 5 and at 6 per cent., according to Dr. Wigglesworth's Table of Mortality.

Age.	5 per ct.	6 per ct.	Age.	5 per ct.	6 per ct.	Age.	5 per ct.	6 per ct.	Age.	5 per ct.	6 per ct.
0	16.34	17.17	24	22.69	24.10	48	19.67	21.41	72	10.55	11.98
1	21.46	22.54	25	22.62	24.05	49	19.42	21.17	73	10.11	11.50
2	22.71	23.84	26	22.54	23.97	50	19.15	20.91	74	9.68	11.04
3	23.59	24.77	27	22.43	23.88	51	18.87	20.63	75	9.25	10.57
4	24.18	25.40	28	22.33	23.78	52	18.58	20.35	76	8.81	10.08
5	24.45	25.69	29	22.22	23.69	53	18.28	20.05	77	8.36	9.59
6	24.52	25.77	30	22.12	23.59	54	17.96	19.74	78	7.93	9.10
7	24.58	25.85	31	22.01	23.50	55	17.64	19.42	79	7.51	8.63
8	24.57	25.86	32	21.91	23.42	56	17.29	19.08	80	7.11	8.19
9	24.51	25.81	33	21.82	23.33	57	16.94	18.72	81	6.69	7.72
10	24.41	25.72	34	21.72	23.25	58	16.57	18.34	82	6.29	7.27
11	24.23	25.55	35	21.63	23.17	59	16.18	17.94	83	5.95	6.88
12	24.03	25.36	36	21.50	23.06	60	15.77	17.53	84	5.70	6.60
13	23.83	25.16	37	21.38	22.94	61	15.34	17.08	85	5.63	6.53
14	23.61	24.94	38	21.25	22.83	62	14.89	16.61	86	5.18	6.01
15	23.39	24.71	39	21.12	22.72	63	14.42	16.12	87	4.78	5.55
16	23.29	24.63	40	21.00	22.61	64	13.93	15.59	88	4.49	5.23
17	23.21	24.56	41	20.88	22.51	65	13.40	15.03	89	4.36	5.08
18	23.14	24.49	42	20.75	22.40	66	13.02	14.63	90	4.68	5.46
19	23.06	24.42	43	20.64	22.30	67	12.63	14.22	91	4.14	4.84
20	22.99	24.36	44	20.52	22.21	68	12.23	13.80	92	3.50	4.10
21	22.92	24.30	45	20.40	22.10	69	11.83	13.36	93	2.86	3.37
22	22.84	24.23	46	20.16	21.88	70	11.41	12.91	94	2.25	2.65
23	22.76	24.16	47	19.92	21.65	71	10.98	12.45	95	1.73	2.04

This table exhibits the value of a widow's dower in the income of \$100. It is exactly one-third of the value given by table F. Thus, if a widow has a right of dower in an estate worth \$3000, her age being 40 years, and the rate of interest 5 per cent., we should find by the table the present value of her life-right to be worth 21 per cent.; hence we get the present value of her dower, \$630. We get nearly the same result from table F., where the life-right is 62.99 per cent. on her third part of \$3000, or \$1000 set off to her for dower, making its present value \$629.90.—*Amer. Almanac*, 1856, pp. 227, 229.

H.

VALUE OF THE

TABLE, showing the present value of the Right of Dower of a Married

In the following table, as given by Mr. Bowditch, the age of the husband, like that of the wife, begins with 16 years, and embraces all the even numbers to the age of 90 years, inclusive; but with respect to the husband, the ages 16, 18, 20, 24, 28, 78, 82, 86, 88, and 90, are here omitted, in order to reduce the table to the width of the page. The ages near the two extremes are those which will be most rarely wanted in such a table.

Age of the Husband.

Age of the Wife.	Age of the Husband.																Age of the Wife.
	22	26	30	32	34	36	38	40	42	44	46	48	50	52	54		
16	3.68	4.10	4.58	4.85	5.14	5.43	5.73	6.06	6.42	6.81	7.25	7.74	8.42	9.18	9.93	16	
18	3.57	3.99	4.51	4.76	5.03	5.29	5.65	5.99	6.35	6.73	7.08	7.57	8.21	8.96	9.71	18	
20	3.45	3.88	4.38	4.64	4.92	5.15	5.49	5.86	6.22	6.60	6.90	7.38	8.00	8.74	9.49	20	
22	3.33	3.77	4.25	4.46	4.74	5.00	5.33	5.69	6.03	6.43	6.72	7.19	7.79	8.52	9.27	22	
24	3.23	3.65	4.11	4.32	4.57	4.85	5.17	5.52	5.85	6.18	6.54	6.99	7.58	8.30	9.05	24	
26	3.12	3.53	3.97	4.18	4.42	4.70	5.01	5.35	5.66	5.98	6.36	6.79	7.37	8.08	8.83	26	
28	3.01	3.41	3.83	4.03	4.26	4.54	4.84	5.17	5.47	5.78	6.17	6.59	7.15	7.85	8.60	28	
30	2.90	3.28	3.69	3.88	4.10	4.38	4.66	4.99	5.28	5.58	5.96	6.38	6.93	7.61	8.35	30	
32	2.79	3.15	3.55	3.73	3.94	4.21	4.48	4.80	5.09	5.38	5.74	6.16	6.70	7.36	8.08	32	
34	2.68	3.02	3.40	3.57	3.78	4.03	4.30	4.60	4.88	5.17	5.51	5.92	6.45	7.10	7.80	34	
36	2.56	2.89	3.25	3.41	3.61	3.85	4.11	4.40	4.66	4.94	5.26	5.66	6.18	6.83	7.51	36	
38	2.44	2.76	3.10	3.25	3.44	3.67	3.92	4.19	4.44	4.70	5.00	5.39	5.90	6.53	7.21	38	
40	2.32	2.62	2.95	3.09	3.27	3.49	3.72	3.98	4.22	4.46	4.74	5.11	5.61	6.22	6.89	40	
42	2.20	2.48	2.79	2.93	3.10	3.30	3.52	3.76	3.99	4.22	4.48	4.83	5.31	5.90	6.56	42	
44	2.07	2.34	2.63	2.76	2.92	3.11	3.32	3.54	3.75	3.98	4.22	4.55	4.99	5.57	6.21	44	
46	1.94	2.21	2.47	2.59	2.73	2.92	3.12	3.32	3.50	3.71	3.96	4.26	4.67	5.22	5.84	46	
48	1.85	2.10	2.31	2.42	2.54	2.76	2.91	3.10	3.25	3.44	3.71	3.97	4.35	4.85	5.45	48	
50	1.71	1.92	2.15	2.24	2.35	2.56	2.71	2.87	3.00	3.17	3.49	3.75	4.03	4.48	5.05	50	
52	1.54	1.74	1.95	2.06	2.18	2.31	2.45	2.60	2.76	2.90	3.18	3.46	3.78	4.12	4.63	52	
54	1.40	1.58	1.77	1.87	1.97	2.08	2.21	2.34	2.48	2.63	2.81	3.05	3.37	3.77	4.21	54	
56	1.30	1.44	1.61	1.70	1.79	1.89	1.99	2.10	2.22	2.35	2.50	2.72	3.00	3.36	3.80	56	
58	1.17	1.32	1.48	1.56	1.64	1.72	1.81	1.90	2.00	2.11	2.24	2.39	2.59	2.87	3.27	58	
60	1.03	1.17	1.32	1.40	1.48	1.56	1.65	1.74	1.84	1.95	2.07	2.20	2.35	2.57	2.89	60	
62	0.91	1.03	1.16	1.23	1.30	1.37	1.45	1.54	1.63	1.73	1.85	1.99	2.17	2.38	2.64	62	
64	0.82	0.92	1.03	1.09	1.16	1.23	1.30	1.37	1.44	1.51	1.61	1.75	1.93	2.15	2.41	64	
66	0.74	0.82	0.92	0.97	1.02	1.08	1.13	1.19	1.25	1.31	1.37	1.47	1.63	1.85	2.12	66	
68	0.65	0.73	0.82	0.86	0.91	0.96	1.01	1.06	1.10	1.15	1.20	1.25	1.36	1.54	1.79	68	
70	0.54	0.62	0.70	0.74	0.78	0.83	0.87	0.92	0.97	1.02	1.07	1.12	1.17	1.27	1.43	70	
72	0.44	0.50	0.57	0.61	0.65	0.69	0.73	0.77	0.81	0.85	0.90	0.96	1.03	1.11	1.22	72	
74	0.38	0.43	0.49	0.52	0.55	0.58	0.61	0.64	0.68	0.71	0.75	0.86	0.89	0.98	1.08	74	
76	0.35	0.38	0.42	0.45	0.48	0.51	0.53	0.56	0.58	0.60	0.63	0.67	0.73	0.82	0.94	76	
78	0.30	0.34	0.38	0.40	0.43	0.45	0.47	0.49	0.50	0.52	0.53	0.55	0.60	0.68	0.79	78	
80	0.24	0.28	0.32	0.34	0.36	0.38	0.41	0.43	0.44	0.46	0.47	0.48	0.50	0.55	0.64	80	
82	0.20	0.22	0.25	0.27	0.29	0.32	0.34	0.36	0.38	0.40	0.41	0.43	0.45	0.47	0.52	82	
84	0.17	0.18	0.21	0.23	0.24	0.25	0.27	0.29	0.30	0.32	0.34	0.37	0.40	0.42	0.45	84	
86	0.14	0.16	0.18	0.19	0.20	0.21	0.22	0.23	0.25	0.26	0.27	0.29	0.32	0.36	0.40	86	
88	0.13	0.15	0.17	0.18	0.19	0.20	0.21	0.21	0.22	0.22	0.23	0.24	0.26	0.30	0.35	88	
90	0.11	0.13	0.15	0.16	0.17	0.18	0.19	0.20	0.21	0.21	0.22	0.22	0.23	0.25	0.29	90	
	22	26	30	32	34	36	38	40	42	44	46	48	50	52	54		

Age of the Husband.

RIGHT OF DOWER.

*Woman, in an estate worth \$100, provided she survives her Husband.**

The table is to be entered at the top with the age of the husband, and at the side with the age of the wife; under the former and opposite to the latter is the present value of the dower-right in an estate worth one hundred dollars.

Thus, if the age of the husband be 50 years, and that of the wife 32 years, the present value of the dower in \$100 is \$6.70; so that if the estate be worth \$10,000, the present value of the dower-right would be \$670.—*American Almanac*, 1856, pp. 230-31.

Age of the Husband.

Age of the Wife.	Age of the Husband.														Age of the Wife.
	56	58	60	62	64	66	68	70	72	74	76	80	84		
16	10.69	11.62	12.48	13.20	13.86	14.67	15.63	16.62	17.74	18.53	19.27	20.78	22.10	16	
18	10.51	11.40	12.24	12.96	13.63	14.45	15.39	16.41	17.51	18.31	19.03	20.48	21.86	18	
20	10.30	11.18	12.03	12.72	13.40	14.22	15.15	16.18	17.26	18.08	18.78	20.18	21.62	20	
22	10.09	10.95	11.80	12.48	13.17	13.98	14.90	15.93	16.99	17.85	18.56	19.87	21.34	22	
24	9.86	10.71	11.56	12.23	12.94	13.73	14.63	15.66	16.74	17.60	18.25	19.57	21.05	24	
26	9.62	10.47	11.30	11.97	12.69	13.46	14.35	15.37	16.46	17.34	17.96	19.28	20.77	26	
28	9.37	10.22	11.03	11.70	12.42	13.18	14.05	15.06	16.15	17.06	17.66	18.96	20.47	28	
30	9.11	9.96	10.75	11.42	12.13	12.88	13.74	14.74	15.82	16.75	17.34	18.65	20.14	30	
32	8.84	9.69	10.46	11.13	11.82	12.57	13.42	14.41	15.48	16.40	17.00	18.32	19.78	32	
34	8.56	9.40	10.15	10.82	11.50	12.25	13.09	14.07	15.12	16.01	16.65	17.96	19.39	34	
36	8.26	9.08	9.82	10.49	11.16	11.92	12.75	13.71	14.74	15.62	16.28	17.57	19.00	36	
38	7.95	8.75	9.48	10.13	10.80	11.57	12.39	13.33	14.34	15.22	15.89	17.15	18.59	38	
40	7.62	8.41	9.13	9.76	10.42	11.19	12.00	12.93	13.93	14.80	15.47	16.72	18.16	40	
42	7.27	8.04	8.76	9.37	10.02	10.78	11.58	12.50	13.52	14.37	15.03	16.28	17.70	42	
44	6.91	7.65	8.37	8.96	9.60	10.34	11.13	12.04	13.08	13.92	14.56	15.76	17.22	44	
46	6.53	7.25	7.95	8.52	9.15	9.87	10.65	11.54	12.59	13.52	14.06	15.22	16.70	46	
48	6.10	6.84	7.49	8.04	8.66	9.37	10.15	11.00	12.03	12.72	13.50	14.65	16.10	48	
50	5.64	6.17	7.01	7.52	8.12	8.83	9.61	10.43	11.39	11.90	12.87	14.05	15.41	50	
52	5.28	5.56	6.22	6.97	7.54	8.24	9.02	9.82	10.68	11.27	12.16	13.32	14.63	52	
54	4.78	5.18	5.72	6.30	6.92	7.59	8.37	9.18	9.97	10.72	11.37	12.81	13.77	54	
56	4.30	4.81	5.33	5.85	6.37	6.89	7.68	8.48	9.26	9.62	10.50	12.01	13.12	56	
58	3.79	4.39	4.96	5.50	6.00	6.46	6.89	7.77	8.56	8.64	9.37	10.90	12.06	58	
60	3.31	3.83	4.41	4.95	5.47	5.98	6.48	6.98	7.85	8.08	8.69	9.99	11.23	60	
62	2.97	3.36	3.82	4.33	4.87	5.43	6.00	6.57	7.15	7.72	8.28	9.36	10.37	62	
64	2.70	3.03	3.39	3.78	4.22	4.71	5.25	5.84	6.47	7.14	7.76	8.84	9.70	64	
66	2.43	2.74	3.06	3.39	3.74	4.12	4.55	5.04	5.60	6.22	6.88	8.05	9.02	66	
68	2.09	2.44	2.77	3.07	3.38	3.69	4.02	4.39	4.82	5.32	5.89	7.08	8.08	68	
70	1.67	1.98	2.36	2.70	3.01	3.32	3.65	3.94	4.27	4.65	5.09	6.15	7.12	70	
72	1.36	1.57	1.85	2.17	2.50	2.84	3.18	3.53	3.88	4.24	4.61	5.38	6.23	72	
74	1.20	1.35	1.54	1.77	2.03	2.33	2.67	3.05	3.43	3.77	4.11	4.80	5.49	74	
76	1.09	1.25	1.42	1.59	1.76	1.94	2.16	2.43	2.76	3.15	3.60	4.35	5.03	76	
78	0.94	1.12	1.29	1.45	1.60	1.75	1.90	2.08	2.31	2.61	2.98	3.78	4.46	78	
80	0.77	0.94	1.10	1.26	1.41	1.56	1.71	1.87	2.06	2.28	2.54	3.20	3.85	80	
82	0.60	0.71	0.84	1.00	1.16	1.33	1.50	1.68	1.87	2.07	2.29	2.75	3.28	82	
84	0.50	0.58	0.68	0.79	0.90	1.03	1.18	1.36	1.57	1.81	2.04	2.45	2.80	84	
86	0.45	0.51	0.58	0.66	0.74	0.83	0.94	1.08	1.25	1.44	1.66	2.09	2.48	86	
88	0.41	0.48	0.55	0.62	0.69	0.76	0.83	0.92	1.04	1.20	1.39	1.79	2.17	88	
90	0.35	0.42	0.51	0.60	0.68	0.75	0.81	0.87	0.96	1.08	1.23	1.57	1.92	90	
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* In the first volume of this work reference is occasionally made to the Revised Code of the District of Columbia, of 1857. I found it upon the shelves of our law libraries, and took it for granted that it was in force. I have since learned that it was rejected by a vote of the electors of the District, and therefore never went into operation.

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